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No. 80-

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1980

THE NORTH HAVEN BOARD OF EDUCATION,
Petitioner

vs.

SHIRLEY M. HUFSTEDLER, et al.,
Respondents

and

THE TRUMBULL BOARD OF EDUCATION,
Petitioner

vs.

UNITED STATES DEPARTMENT OF EDUCATION

and

LINDA POTZ,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Susan K. Krell
Siegel, O'Connor & Kainen, P.C.
60 Washington Street
Hartford, CT 06106
(203) 547-0550

Counsel for Petitioner
The North Haven Board of Education

Clifford R. Oviatt, Jr.
Paul E. Knag
Richard W. Rutherford
Cummings & Lockwood
855 Main Street
Bridgeport, CT 06604
(203) 327-1700

Counsel for Petitioner
The Trumbull Board of Education

QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit erred when it contradicted the views of the Courts of Appeals for the First, Fifth, Sixth, Eighth and Ninth Circuits, as well as all of the many lower courts which have ruled upon the issue, all of which hold that the Department of Education's comprehensive employment discrimination regulations now codified at 34 C.F.R. §§ 106.51-106.61 are illegal, as beyond the authority conferred by §§ 901 and 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681(a) and 1682.

On December 1, 1980, in United States Department of Education v. Seattle University, Docket No. 80-493, 49 U.S.L.W.

3409, this Court granted certiorari with respect to the Ninth Circuit's decision on this issue.

II

PARTIES

The caption of the case in this Court contains the names of all parties except Thomas Burns, Director of Region I of the Office for Civil Rights, Department of Education, and Maria C. Montalvo, Chief of the Elementary and Secondary Education Branch of Region I, who are respondents in the North Haven case.

The North Haven Board of Education and the Trumbull Board of Education jointly petition for a writ of certiorari to review the judgment herein of the United States Court of Appeals for the Second Circuit.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. B) is reported at 629 F.2d 773. Its denial of the Petition for Rehearing (App. C) is not officially reported. The opinions of the District Court (App. D-1 and D-2, North Haven, and App. E-1 and E-2, Trumbull) are not officially reported. The North Haven District Court decision is unofficially reported in 19 F.E.P. Cases 1505 (D. Conn. April 26, 1979).

JURISDICTION

The judgment of the Court of Appeals was dated and entered on July 24, 1980 (App. B). On August 7, 1980, petitioners sought rehearing en banc, which was denied by the Court of Appeals by order dated and entered October 24, 1980 (App. B).

Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The following statutes and regulations, reproduced in full in the Appendix, are involved in this petition:

1. Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a). (App. A)

2. Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1682. (App. A)

3. The regulations of the Department of Education, 34 C.F.R. §§ 106.51-106.61.* (App. A)

*These regulations, at the time of the District Court's decisions, appeared at 45 C.F.R. §§ 86.51-86.61 inclusive. They were recodified on May 9, 1980, in connection with the establishment of the Department of Education, 45 Fed. Reg. 30802, 30962, 30963 (1980).

Statement of the Case

Petitioners, the North Haven Board of Education ("North Haven") and the Trumbull Board of Education ("Trumbull"), are local Connecticut school boards whose employment practices were the subject of charges of sex discrimination in employment filed with the United States Department of Health, Education and Welfare ("HEW").* HEW, claiming

*The relevant functions of HEW (those under Title IX of the Education Amendments of 1972) were transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678. Since many of the relevant actions in this case were taken by HEW prior to the reorganization, this petition refers to that agency in addition to the Department of Education ("DOED").

authority by virtue of Subpart E of its regulations, (then 45 C.F.R. §§ 86.51-86.61), purportedly implementing §§ 901 and 902 of Title IX of the Education Amendments of 1972, processed both complaints.* Both school boards pointed out that Subpart E exceeded the authority granted to HEW by Title IX and each cited the line of cases that began with Romeo Community Schools v. HEW, 438 F. Supp. 1021 (E.D. Mich. 1977), aff'd 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979) which first declared the Subpart E regulations invalid, and which triggered a virtual landslide of similar successful challenges to the regulations in district and

*After its establishment, the DOED reissued the regulations of Subpart E at 34 C.F.R. §§ 106.51-106.61 (hereafter "Subpart E").

circuit courts from coast to coast. To date, in addition to the decisions of the District Court herein, the following cases have all ruled Subpart E to be invalid: Dougherty County School System v. Harris, 622 F.2d 735 (5th Cir. 1980), aff'g 19 F.E.P. Cases 688 (M.D. Ga. 1978); Seattle University v. HEW, 621 F.2d 992 (9th Cir. 1980), cert. granted, 49 U.S.L.W. 3409 (Dec. 1, 1980), No. 80-493, aff'g 16 F.E.P. Cases 719 (W.D. Wash. 1978); Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972, aff'g 438 F. Supp. 1021 (E.D. Mich. 1977); Junior College District of St. Louis v. Califano, 597 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972, aff'g 455 F. Supp. 1212 (E.D.

Mo. 1978); Islesboro School Committee v. Califano, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972, aff'g Brunswick School Board v. Califano, 449 F. Supp. 866 (D. Me. 1978); Grove City College v. Harris, No. 78-1293 (W.D. Pa. March 10, 1980) [appeal pending, Docket No. 80-2383, Aug. 22, 1980; cross appeal pending, Docket No. 80-2384, Sept. 3, 1980]; Auburn School District v. HEW, No. 78-154, 19 F.E.P. Cases 1504 (D.N.H. March 29, 1979), appeal dismissed, No. 79-1261 (1st Cir. 1980); Board of Education of Bowling Green City District v. HEW, No. C 78-177, 19 F.E.P. Cases 457 (N.D. Ohio March 14, 1979); University of Toledo v. HEW, 464 F. Supp. 693 (N.D. Ohio 1979). See also Sobel v. Yeshiva University, 477 F. Supp.

1161 (S.D.N.Y. 1979) (Goettel, J.) (no private right of action under Title IX for employment discrimination); Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979) (same); Kneeland v. Bloom Township High School District, 484 F. Supp. 1280 (N.D. Ill. 1980) (same).

Despite requests by North Haven and Trumbull not to proceed, HEW persisted, and demanded cooperation, in North Haven's case under threat of administrative enforcement proceedings leading to the termination of federal financial aid, which in both school systems is substantial. However, no HEW investigation of North Haven occurred, as North Haven promptly filed suit after being advised of HEW's refusal to hold its investigation in abeyance. Trumbull co-

operated with HEW's investigation, at the end of which HEW sent a letter claiming that Trumbull had violated the Subpart E regulations and demanding that Trumbull agree, again under threat of a fund cutoff, to HEW's remedial plan for corrective action.*

Both school boards brought suit in the District of Connecticut, seeking injunctive and declaratory relief against the further use of Subpart E by HEW.**

*Had Trumbull not brought suit at this point, administrative hearings on the merits of the purported findings would have been the next step in HEW's enforcement efforts. See 45 C.F.R. § 80.8.

**North Haven's suit was brought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706, the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, the federal question statute, 28 U.S.C. § 1331, and the mandamus provisions of 28 U.S.C. § 1361.
(continued on next page)

In the North Haven case, HEW filed a Motion to Dismiss, or, in the Alternative, for Summary Judgment, and North Haven cross-moved for summary judgment. Judge Ellen Bree Burns granted North Haven's motion, declaring Subpart E to be invalid, void and of no effect whatsoever, and permanently enjoined HEW from attempting to cut off federal aid to North Haven for alleged non-compliance with the regulations.

In granting summary judgment to North Haven, the District Court followed the reasoning found persuasive by the many other courts which have ruled Sub-

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(continued from page 9)
Trumbull's complaint, in addition to the statutory bases cited by North Haven, relied upon Article I and the Fifth and Fourteenth Amendments to the United States Constitution and upon 42 U.S.C. § 1988.

part E to be invalid. In ruling that HEW's employment regulations were beyond the scope of authority granted in Title IX, these courts have relied on several factors. First, § 901 of Title IX, on its face, does not cover the employment practices of educational institutions, but rather prohibits sex discrimination against the beneficiaries of federal programs, i.e., students. In addition, as the District Court noted, the express exclusions from coverage of Section 901 of Title IX relate solely to student activities or enrollment, and do not mention employment.

Moreover, in reviewing the fund-termination provisions of § 902 of Title IX, the courts have noted how unlikely it was that Congress could

have authorized HEW to terminate funds (which penalizes students) in order to vindicate the rights of teachers. The courts have also relied upon the fact that § 902 of Title IX is a pin-point termination provision. That is, under § 902, termination as a remedy is limited to the particular program where there is non-compliance, and the HEW regulations are concededly and deliberately not so limited.

Additionally, implied coverage of employment in § 901 seems unlikely in view of the express provisions of §§ 906 and 908 of Title IX, which covered employment discrimination in educational institutions by amending 42 U.S.C. § 2000e-2(e)(1) (Title VII) and 29 U.S.C. § 213(a) (the Equal

Pay Act). Thus, the § 901 jurisdiction claimed by HEW and now DOED, over employment is highly improbable considering the structure of the statute, and is also unnecessary and duplicative.*

*In fact, Elaine Dove, who filed the HEW complaint against North Haven, also filed charges with the Equal Employment Opportunity Commission (EEOC Charge No. 011780551). Dove also filed a federal court suit alleging violations of Title VII of the 1964 Civil Rights Act and 42 U.S.C. § 1983 as well as Title IX violations. Linda Potz, who filed the HEW complaint against Trumbull, also availed herself of other remedies by filing an EEOC complaint (EEOC Charge No. 011791590), an appeal to the Connecticut Freedom of Information Commission (#F.I.C.-77-156), an appeal to the Connecticut Court of Common Pleas (D.N. 1183125, Fairfield County at Bridgeport) and a Connecticut State Labor Board unfair labor practice charge (T.P.P. 3963) as well as seeking relief through contractual grievance procedures. She has also sued Shirley Blumin, Director of Pupil Services in Trumbull, in Superior Court (D.N. 165640, Fairfield County at Bridgeport) for five hundred thousand dollars ($500,000) damages for allegedly falsely stating that Potz was incompetent.

Further, the Connecticut District Court, as have the numerous other courts, rejected the Government's arguments based on a tortured view of the legislative history. They have also rejected the contention that Subpart E addresses discrimination against students, since Subpart E on its face regulates employment and not the student relationship.

Following Judge Burns' decision in North Haven, (App. D-1, D-2) Trumbull, whose case had also been assigned to Judge Burns, likewise moved for summary judgment. While the government declined to file a brief, noting that the North Haven decision controlled Trumbull's case, respondent Potz, who had filed the HEW complaint against Trumbull, filed a Cross-Motion for

Summary Judgment and sought discovery. The District Court granted Trumbull's Motion for Summary Judgment on May 24, 1979 (App. E-1), relying upon the North Haven decision, and denied Potz's Motion for Summary Judgment.

When Potz moved to open the judgment, the District Court issued a separate opinion rejecting Potz's additional claims based on this Court's decision in Cannon v. University of Chicago, 441 U.S. 677 (1979) (Title IX permits a private right of action) and again rejected HEW's interpretation of the legislative history of Title IX (App. E-2).

The subsequent appeals by Potz and HEW in both cases were held inactive pending action by this Court on petitions for certiorari in three of the cases

(Romeo Community Schools v. HEW, supra; Islesboro School Committee v. Califano, supra and Junior College District of St. Louis v. Califano, supra) which had declared the regulations in Subpart E invalid. When certiorari was denied in all three cases, the cases herein were consolidated for briefing and argument, and were reactivated.

On June 19, 1980, prior to the Second Circuit's decision, the Ninth Circuit Court of Appeals issued its decision in the Seattle University case, supra. Like the other circuits, the Ninth Circuit ruled the regulations invalid.

On July 24, 1980, the Court of Appeals ruled herein, reversing and remanding for further proceedings both judgments by the District Court, and thus became the only court in the country

to uphold the Subpart E regulations (App. B). The Court of Appeals found the plain language of the statute an insufficient basis for decision, and relied instead upon admittedly ambiguous portions of the legislative history, emphasizing selected excerpts from comments by Senator Bayh during the floor debate.

On July 28, 1980, the Fifth Circuit also ruled the Subpart E regulations invalid, but stated in dictum that § 901 of Title IX did reach employees paid with federal funds. Dougherty County School System v. Harris, supra, 622 F.2d at 738.

Petitioners moved for rehearing on August 7, 1980, which was denied on October 24, 1980 (App. C). As noted above, relying on the conflict created by the decision of the Second Circuit

herein, the government has sought and obtained certiorari in the Seattle case, filed September 26, 1980, cert. granted, 49 U.S.L.W. 3409 (Dec. 1, 1980), No. 80-493.

I. Reasons for Granting the Petition.

A. The Issue Herein is Already Pending Before This Court.

A writ of certiorari to the Ninth Circuit Court of Appeals was granted on December 1, 1980 by this Court in the above-noted case presenting the same issue, United States Department of Education v. Seattle University, No. 80-493, 49 U.S.L.W. 3409. If anything, the instant case is a stronger one for the exercise of this Court's discretion to grant a writ of certiorari, since it is by virtue of the ruling herein by the United States Court of Appeals for the

Second Circuit that there is conflict as to the validity of Subpart E.

Further, we are advised that Seattle University regards its matter as moot and that, accordingly, the extent to which further active participation by Seattle University will be undertaken in the Seattle case is unclear.

The government's brief in the Seattle case is due on January 15, 1981, so that it would appear that, should certiorari be granted in these cases, it would be feasible to consolidate them for joint argument.

B. The Circuit Courts of Appeal are in Conflict.

As the Court of Appeals below recognized, the circuits are in conflict on the question at issue here. The Courts of Appeals for the First, Sixth,

Eighth and Ninth Circuits have all ruled that Title IX of the Education Amendments of 1972 does not confer jurisdiction upon HEW (now DOED) to regulate employment discrimination and that, accordingly, the Subpart E regulations are invalid. The decision below held that, to the contrary, Title IX does confer jurisdiction over employment discrimination, and the regulations are therefore valid. Subsequent to the ruling herein below, yet a third position has been taken by the Court of Appeals for the Fifth Circuit in Dougherty County School System v. Harris, supra, which while agreeing with the First, Sixth, Seventh, Eighth and Ninth Circuits that the Subpart E regulations are invalid, nevertheless indicated in dictum that § 901 of Title IX does affect those employees paid with federal funds.

It is important that North Haven and Trumbull be granted an opportunity to be heard in resolving this conflict between the circuits, because it is their school districts and their federally financed programs that are imperiled by DOED's illegal regulations.

C. The Second Circuit Ruling Wrongly Construes a Major Federal Statute Which Affects Schools and Students Throughout the Nation.

As so many courts have held, and contrary to the ruling by the Second Circuit, Section 901 of Title IX protects the student beneficiaries in federally funded programs and not their teachers. Indeed, it is plain that coverage of employment discrimination is inconsistent with the clear language of the statute.

Section 901 of Title IX of the Education Amendments of 1972 is construc-

ted in two parts. It begins with a basic prohibition, and then in subsections (a)(1)-(9), lists nine specific exclusions from coverage. Those subsections (1) exempt certain types of institutions entirely; (2) address the admission practices of certain non-exempt institutions and (3) exempt certain student programs such as beauty pageants, boy or girl conferences and parent/child activities.

The basic question for decision is whether the following language, the basic prohibition of § 901, addresses employment:

> No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

The Court of Appeals, rejecting the views of several circuits, found this language to be ambiguous, and an insufficient basis for determining the scope of § 901 of Title IX. 629 F.2d at 778. However, it is nevertheless clear that the statute, in plain words, focuses upon what happens within an education program or activity receiving Federal financial assistance. Those who are participants in, receive the benefits of, or are under such a program or activity are plainly students, not employees. Employment, as a concept and as a word, is entirely absent from § 901, as are any of the restrictions and parameters one would expect in a statute directed at employment (cf. Title VII and its BFOQ exception, 42 U.S.C. § 2000e-2(e)(1)).

This construction of the basic prohibition of § 901 is confirmed by the express and detailed tailoring of its coverage contained in subsections (a)1-9, not one of which addresses employment practices. As the Romeo District Court noted:

> [T]his can be explained in only one of two ways: either Congress meant to allow wide open coverage of employment practices under § 1681 while closely regulating § 1681 coverage in all other respects, or, what appears more likely, Congress never meant to include employment practices within the coverage of § 1681 in the first place. Romeo Community Schools v. HEW, 438 F. Supp. 1021, 1032 (E.D. Mich. 1977).

Of course, the lack of coverage of employment in § 901 of Title IX is not surprising: §§ 906 and 908 of the very same bill already addressed the issue by amending 42 U.S.C. § 2000e-2(e)(1) (Title VII of the Civil Rights Act

of 1964) and 29 U.S.C. § 213(a) (the Equal Pay Act) to cover school employees.

In this connection, it is interesting to note that the isolated references to employment in the selected passages from the Senate debate, relied on so heavily by the Court of Appeals, are actually at best ambiguous, for it is never clear whether § 901 alone, or the entire amendment, including, §§ 906 and 908 as well, are referred to. Indeed, many more parts of the legislative history, including Senator Bayh's own outline of the bill, support petitioners' contention that coverage of employment was reserved for §§ 906 and 908.

On this point, while it is inappropriate in this petition to detail the ample legislative history supporting respondents' position, or the convincing rebuttals to the arguments based on

the legislative history relied on by the Court of Appeals, the comments of the First Circuit bear repeating:

> "While it is true that there were occasional lapses during the discussions, wherein one of the senators would telescope the sections, thereby suggesting that employment was to be covered under the basic provisions of Title IX, a careful examination of the debates has led us to conclude that these were the product of the imprecision of oral discussion rather than a reflection that the Act intended section 901 of Title IX to embrace prohibitions against sex discrimination in employment. This was reserved for the amended Title VII and the Equal Pay Act." Islesboro School Committee v. Califano, 593 F.2d at 428 (emphasis added).

Conclusion

This Court should now resolve the conflict existing in the Courts of Appeals as to the scope of coverage of § 901 of Title IX of the Education Amend-

ments of 1972, and as to the legality of the Subpart E regulations, which are at present invalid in five circuits, valid in one circuit, and of uncertain status in the rest. The petitioners respectfully request that this Court grant their petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit and consolidate the cases for argument with United States Department of Education v. Seattle University, Docket No. 80-493.

RESPECTFULLY SUBMITTED,
THE PETITIONER
THE NORTH HAVEN BOARD OF EDUCATION

By_____

Susan K. Krell
Siegel, O'Connor & Kainen, P.C.
60 Washington Street
Hartford, Connecticut 06106
(203) 547-0550

RESPECTFULLY SUBMITTED,
THE PETITIONER
THE TRUMBULL BOARD OF EDUCATION

By_____

Clifford R. Oviatt
Paul E. Knag
Richard W. Rutherford
Cummings & Lockwood
855 Main Street
Bridgeport, Connecticut 06604
(203) 327-1700

Dated: December 1980

CERTIFICATION

The undersigned, a member of the Bar of this Court, hereby certifies that on the day of December, 1980 he placed in a United States Post Office mail box, first class postage prepaid, three copies of the foregoing Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Department of Education
Washington, D.C. 20530

Attorney Marie Klimesz
United States Department
of Justice
Washington, D.C. 20530

Attorney Beverly J. Hodgson
Koskoff, Koskoff & Bieder, P. C.
55 Chapel Street
Bridgeport, Connecticut 06604

Richard W. Rutherford

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Susan K. Krell
Siegel, O'Connor & Kainen, P.C.
60 Washington Street
Hartford, CT 06106
(203) 547-0550

Counsel for Petitioner
The North Haven Board of Education

Clifford R. Oviatt, Jr.
Paul E. Knag
Richard W. Rutherford
Cummings & Lockwood
855 Main Street
Bridgeport, CT 06604
(203) 327-1700

Counsel for Petitioner
The Trumbull Board of Education

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APPENDIX A

STATUTES AND REGULATIONS

1. Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a).

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
>
> Classes of educational institutions subject to prohibition
>
> (1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;
>
> Educational institutions commencing planned change in admissions
>
> (2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972,

nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

Educational institutions of religious organizations with contrary religious tenets

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

Educational institutions training individuals for military services or merchant marine

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

Public educational institutions with traditional and continuing admissions policy

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

Social fraternities or sororities; voluntary youth service organizations

(6) this section shall not apply to membership practices --

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students

in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

Boy or Girl conferences

(7) this section shall not apply to

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for --

(i) the promotion of any Boys State conference, Boys Nation conference, Girls

State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

Father-son or mother-daughter activities at educational institutions

(8) this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

Institution of higher education scholarship awards in "beauty" pageants

(9) this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual

and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

2. Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1682, provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance

under such program or activity to any recipient as to whom there has been an express finding on the record, after an opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the cir-

cumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

3. The regulations of the Department of Education, 34 C.F.R. §§ 86.51-86.61.*

Subpart E--Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

34 C.F.R. § 106.51 Employment.

(a) General. (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefore, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

*These regulations, at the time of the District Court's decisions, appeared at 45 C.F.R. §§ 86.51-86.61 inclusive. They were recodified on May 9, 1980, in connection with the establishment of the Department of Education, 45 Fed. Reg. 30802, 30962, 30963 (1980).

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex. if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) Application. The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

§ 106.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless;

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

§ 106.53 Recruitment.

(a) Nondiscriminatory recruitment and hiring. A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) Recruitment patterns. A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

§ 106.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

§ 106.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression,

seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 106.61.

§ 106.56 Fringe benefits.

(a) "Fringe benefits" defined. For purposes of this part, "fringe benefits" means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 106.54.

(b) Prohibitions. A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

§ 106.57 Marital or parental status.

(a) General. A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of a household or principal wage earner in such employee's or applicant's family unit.

(b) Pregnancy. A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) Pregnancy as a temporary disability. A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) Pregnancy leave. In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a

recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

§ 106.58 Effect of State or local law or other requirements.

(a) Prohibitory requirements. The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) Benefits. A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the

same compensation, service, or benefit to members of the other sex.

§ 106.59 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a bona-fide occupational qualification for the particular job in question.

§ 106.60 Pre-employment inquiries.

(a) Marital status. A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

(b) Sex. A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

§ 106.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1022-24—September Term, 1979

(Argued April 24, 1980 Decided July 24, 1980)

Docket Nos. 79-6136, -6247, -7747

NORTH HAVEN BOARD OF EDUCATION,

Plaintiff-Appellee,

v.

SHIRLEY M. HUFSTEDLER, *et al.,*

Defendants-Appellants.

TRUMBULL BOARD OF EDUCATION,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF EDUCATION and LINDA POTZ,

Defendants-Appellants.

Before:

KAUFMAN and OAKES, *Circuit Judges*, and TENNEY, *District Judge.**

Appeal from orders of summary judgment in the United States District Court for the District of Connecticut, Ellen Bree Burns, *Judge*, declaring regulations governing sex discrimination in employment issued by the Department of Health, Education and Welfare (now adopted by the Department of Education) invalid and enjoining the Department from withholding or threatening to withhold any federal funds under those regulations.

The Court of Appeals held that the employment discrimination regulations contained in 45 C.F.R. Part 86, Subpart E (now in 34 C.F.R. Part 106, Subpart E (May 9, 1980)) were authorized under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and hence were valid and enforceable.

Judgments reversed and cases remanded.

MARIE E. KLIMESZ, United States Department of Justice, Washington, D.C. (Drew S. Days III, Assistant Attorney General, Washington, D.C., Richard Blumenthal, United States Attorney for the District of Connecticut, and Brian

* Of the Southern District of New York, sitting by designation.

K. Landsberg, United States Department of Justice, Washington, D.C., of counsel), *for Appellants Shirley M. Hufstedler et al. and United States Department of Education.*

BEVERLY J. HODGSON, Bridgeport, Conn. (Koskoff, Koskoff & Bieder, Bridgeport, Conn., of counsel), *for Appellant Linda Potz.*

SUSAN K. KRELL, Hartford, Conn. (Siegal, O'Connor & Kainen, Hartford, Conn., of counsel), *for Appellee North Haven Board of Education.*

PAUL E. KNAG, Bridgeport, Conn. (Cummings & Lockwood, Richard W. Rutherford, Bridgeport, Conn., of counsel), *for Appellee Trumbull Board of Education.*

OAKES, *Circuit Judge:*

Cognizant that four other courts of appeals and a number of district courts have held otherwise, we nevertheless are convinced after extreme care and consideration that regulations issued by the United States Department of Health, Education and Welfare (HEW)[1] concerning sex discrimination in educational

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1 At the time these suits were brought and appealed, the regulations in questions were printed at 45 C.F.R. Part 86, Subpart E, under the auspices of HEW. Since the jurisdiction over educational matters was transferred to the new Department of Education on May 4, 1980, these regulations have been reissued in identical form by that department at 34 C.F.R. Part 106, Subpart E, 45 Fed. Reg. 30802

employment are valid under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, as properly construed. Accordingly, we reverse the decisions of the United States District Court for the District of Connecticut, Ellen Bree Burns, Judge, which declared those regulations invalid and which enjoined HEW from withholding educational funding from two Connecticut school districts, North Haven and Trumbull, respectively.

FACTS

Two separate cases are here involved and they will be treated separately for factual purposes even though they both involve the same essential legal question.

I. *North Haven*—North Haven receives federal financial aid for its educational programs and activities, and hence is governed by the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, barring discrimination on the basis of sex. Since the 1975-76 school year, North Haven has used between 46.8% and 66.9% of its federal financial assistance to pay salaries of its employees and is expected to continue doing so.

On January 10, 1978, in response to a private complaint alleging that the North Haven Board of Education was violating Title IX by refusing to rehire a tenured teacher who had taken a one-year maternity leave, HEW requested North Haven to provide specific information concerning its policies on hiring, leaves of

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(May 9, 1980). To be consistent with the briefs of the parties and the district court decision, however, we will continue to refer throughout this opinion to the regulations promulgated by HEW and to HEW's authority under Title IX.

absence, seniority, and tenure. North Haven did not do so, asserting that HEW lacked authority to regulate employment practices under Title IX. When HEW notified the school district that the matter had been referred to its appropriate office for possible administrative enforcement proceedings, North Haven brought this action seeking declaratory and injunctive relief. The complaint alleged that the promulgation by HEW of the regulations contained in 45 C.F.R. Part 86, Subpart E, "was in excess of the statutory authority conferred by Congress in Section 902" of Title IX, 20 U.S.C. § 1682. After HEW moved in the alternative for dismissal or summary judgment and North Haven filed a cross-motion for summary judgment, the district court granted North Haven's motion for summary judgment on April 26, 1979.

II. *Trumbull*—Appellant Linda Potz, a former guidance counselor in the Trumbull public schools, filed an administrative complaint with HEW alleging that the Trumbull Board of Education had discriminated against her on the basis of sex by giving her inferior job assignments, by providing her with inferior working conditions, and by not renewing her contract. The Trumbull board acknowledged receiving "substantial" federal financial assistance, although it is unclear how much, if any, of that assistance was used for guidance counseling. HEW determined that Trumbull had indeed violated Title IX by requiring Potz to perform typing and to run errands not required of male counselors, by moving her office to a smaller, poorly heated, and less comfortable space in the gymnasium away from the other counselors, by asking her to change a report showing that she had seen many more students in a given week than the number seen by her male

counterparts, and by not renewing her contract on the basis of her sex. On September 20, 1978, HEW notified the board that the school district was in violation of Title IX and ordered Trumbull to take corrective action including the reinstatement of Potz. Trumbull did not take such corrective action and instead filed this action for declaratory and injunctive relief against both HEW and Potz challenging HEW's authority to issue Subpart E, as in the North Haven case. The district court granted Trumbull's motion for summary judgment on May 24, 1979, based on its prior decision in North Haven, and on September 13, 1979, denied Potz's timely-filed motion to set aside the prior order of summary judgment and denied her motion for summary judgment.

THE DECISION BELOW

In each case, the district court declared Subpart E invalid and enjoined the federal defendants from interfering with federal financial assistance to plaintiffs for any alleged noncompliance with Subpart E. In holding that the prohibitions of Title IX do not apply to employment practices of educational institutions, the district court reached the same conclusion reached by a number of other courts.[2]

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2 *Seattle University v. HEW*, No. 78-1746 (9th Cir. June 19, 1980) (per curiam) (affirming 16b FEP Cases 719 (W.D. Wash. 1978)); *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir.), *cert. denied*, 100 S. Ct. 467 (1979) (affirming 438 F. Supp. 1021 (E.D. Mich. 1977)); *Junior College District of St. Louis v. Califano*, 597 F.2d 119 (8th Cir.), *cert. denied*, 100 S. Ct. 467 (1979) (affirming 455 F. Supp. 1212 (E.D. Mo. 1978)); *Islesboro School Committee v. Califano*, 593 F.2d 424 (1st Cir.), *cert. denied*, 100 S. Ct. 467 (1979) (affirming *Brunswick School Board v. Califano*, 449 F. Supp. 866 (D. Me. 1978)); *Grove City College v. Harris*, No. 78-1293 (W.D. Pa. March 10, 1980); *Auburn School District v. HEW*, No. 78-154

Section 901(a) of Title IX, 20 U.S.C. § 1681(a), provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

In first granting summary judgment to North Haven, the district court relied principally on the reasoning of another district court in *Romeo Community Schools v. HEW*, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 100 S. Ct. 467 (1979). The district court held that § 901(a) "does not cover the employment practices of educational institutions," but rather only prohibits "sex discrimination against students and other direct beneficiaries of federal educational assistance funds." Aware that Title IX was patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, but without a provision similar to § 604 of Title VI excluding employment from the coverage of the statute,[3] the district court

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(D.N.H. March 29, 1979), *appeal dismissed*, No. 79-1261 (1st Cir. 1980); *Board of Education of Bowling Green City District v. HEW*, No. C78-177, 19 FEP Cases 457 (N.D. Ohio March 14, 1979); *University of Toledo v. HEW*, 464 F. Supp. 693 (N.D. Ohio 1979); *Dougherty County School System v. Califano*, No. 78-30-ALB, 19 FEP Cases 688 (M.D. Ga. August 22, 1978), *appeal docketed*, No. 78-3384 (5th Cir. Nov. 1, 1978).

3 Section 604 of Title VI, 42 U.S.C. § 2000d-3 provides:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

concluded that such a provision was omitted from Title IX because it would have been inconsistent with other portions of the Title IX legislative package pertaining to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and to the Equal Pay Act, 29 U.S.C. § 206(d), rather than because Congress intended that employment be covered under § 901. The court also noted that § 901(a) on its face "addressed itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs," and that the express exclusions from coverage of § 901(a)[4] "relate solely to student activity or enrollment."

The court further relied on the fact that "[t]ermination of federal funds is the only sanction authorized" under Title IX and wondered whether Congress would have authorized termination of funds for a school program, thereby penalizing the students, where more effective and less costly alternative methods of prohibiting employment discrimination were readily available. *See* Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 Geo. L.J. 49, 61-62 (1976). Moreover, under § 902 of the Act, 20 U.S.C. § 1682, the district court noted that any termination of funds is "limited in its effect to the particular program, or part thereof, in which . . . noncompliance has been . . . found,"[5] and that

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4 Section 901(a) contains nine express exclusions from coverage under the basic prohibition, none of which specifically mentions employment.

5 Section 902 of Title IX, 20 U.S.C. § 1682, provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract

regulation of employment practices is inherently "non-program specific." In ruling against appellants, the court also noted that because Subpart E prohibits discriminatory employment practices "for their own sake" these regulations cannot be upheld on the so-called "infection theory" utilized in other cases—*i.e.*, that employment discrimination has an adverse effect upon the students themselves.[6]

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of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

6 *See Caulfield v. Board of Education of the City of New York*, 583 F.2d 605, 610-11 (2d Cir. 1978); *United States v. Jefferson County Board of Education*, 372 F.2d 836, 882-86 (5th Cir. 1966), *adopted en banc per curiam*, 380 F.2d 385 (5th Cir.) *cert. denied*, 389 U.S. 840 (1967).

Later, in a separate opinion ruling in favor of Trumbull, the district court concluded that the Supreme Court's decision in *Cannon v. University of Chicago,* 441 U.S. 677 (1979) (Title IX permits private right of action), did not affect its ruling, and adopted the reasoning of the court of appeals in *Romeo Community Schools v. HEW,* 600 F.2d 581 (6th Cir.), *cert. denied,* 100 S. Ct. 467 (1979), rejecting HEW's interpretation of the legislative history of Title IX. In the district court's view, the legislative history suggested "that Title IX's focus was upon students and other direct beneficiaries."

DISCUSSION

As in any other problem of statutory interpretation we must examine the words of the statute, the legislative history, and the statutory purpose to be served. We may also be aided by examining analogous statutes or statutes *in pari materia* as well as by applicable canons of construction, one of which in the immediate context is to give due weight to the contemporaneous construction of a statute by the agency charged with its administration. *See NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 274-275 (1974); *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-34 (1971). In determining what weight is due, however, as Judge Learned Hand once put it:

> it is doubtful whether in the end one can say more than that there comes a point at which the courts must form their own conclusions. Before doing so they will, of course,—like the administrative tribunals themselves—look for light from every quarter, and after all crannies have been searched,

> will yield to the administrative interpretation in all doubtful cases; but they can never abdicate.

Niagara Falls Power Co. v. FPC, 137 F.2d 787, 792 (2d Cir.), *cert. denied*, 320 U.S. 792 (1943).

HEW argues that the language of § 901(a) clearly encompasses employment discrimination. The argument is that the general category of "person[s]" protected by § 901(a), 20 U.S.C. § 1681(a), is not limited to any particular class of persons and is subject only to the nine express exclusions set out thereafter. Obviously the persons include students and, HEW argues, equally clearly include employees of a university, college or school district who are in a position to "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" federally funded education programs or activities. However, this language is more ambiguous than HEW suggests. The First Circuit, for example, thought in *Islesboro School Committee v. Califano*, 593 F.2d 424, 426 (1st Cir.), *cert. denied*, 100 S. Ct. 467 (1979), that this language, "on its face, is aimed at the beneficiaries of the federal monies, *i.e.*, either students attending institutions receiving federal funds or teachers engaged in special research being funded by the United States government." Indeed, it was due to the ambiguity of the virtually identical language in § 601 of Title VI, 42 U.S.C. § 2000d, and the confusion generated by it, that Congress found it necessary later to enact § 604 of Title VI, 42 U.S.C. § 2000d-3, barring application of Title VI to employment. *See* Kuhn, *supra*, 65 Geo. L.J. at 53-54. We hence must look beyond the language of the statute itself to determine its meaning.

HEW argues that its interpretation of § 901(a) is supported by the fact that none of the nine specific exemptions from the coverage of the statute contained in § 901(a)(1)-(9), 20 U.S.C. § 1681(a)(1)-(9), removes employment from the basic prohibition. We note that Paragraphs (a)(3) and (4) exclude religious and military institutions from the application of the statute and that the remaining exclusions exempt certain practices of otherwise covered institutions. It is true as HEW contends that none of these exemptions addresses the question of employment discrimination or in any way suggests that employment practices are excluded from the basic prohibition of the statute. But, as the Sixth Circuit has said, this argument "cuts both ways." *Romeo Community Schools, supra,* 600 F.2d at 584. While we cannot agree with HEW that the failure of the exclusions to mention employment is clear support for its position, we also cannot agree with the Sixth Circuit that because the exceptions relate to students "[i]t may be fairly assumed" that only students are the subject of § 901. *Id.* Indeed, Paragraphs (a)(3) and (4) do not mention students at all, but rather exempt entire categories of institutions. The Sixth Circuit's "assumption" is precisely that, and whether it is "fair" or not depends on the legislative history and purpose of Title IX.

HEW is on somewhat firmer footing when it argues that although Title IX is modeled after Title VI of the Civil Rights Act of 1964, *see Cannon v. University of Chicago, supra,* 441 U.S. at 694-96, Title IX conspicuously omits Title VI's exclusion of employment practices contained in 42 U.S.C. § 2000d-3,[7] even

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7 *See* note 3 *supra.*

though the House proposed to include an equivalent provision in Title IX.[8] But the First and Sixth Circuits, as well as the court below, have taken the position that the House proposal was not ultimately included in Title IX because it would have been inconsistent with the sections of Title IX pertaining to employment discrimination under Title VII of the 1964 Civil Rights Act and the Equal Pay Act. *Islesboro School Committee, supra,* 593 F.2d at 428; *Romeo Community Schools, supra,* 600 F.2d at 584. *See also* Kuhn, *supra,* 65 Geo. L. J. at 57 ("The inclusion of section 904 in the bill was nothing more than a drafting mistake.") Again, we are pointed to a careful examination of the legislative history and purpose of the statute to determine whether HEW's conclusion or that of these other courts is the correct one.

In our view the legislative history, closely examined, supports HEW rather than the various court decisions which we have mentioned above. The Supreme Court has informed us of the overall objectives Congress sought in enacting Title IX:

> First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.

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8 *See* H.R. Rep. No. 554, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2462, 2566. The Conference Committee Report contains the following:

> (f) In addition, the House amendment, but not the Senate amendment, provided that nothing in the title authorizes action by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. The House recedes.

Id. at 2671-72.

Cannon, supra, 441 U.S. at 704. We turn then to the actions of each House and of the conference committee to make the determination whether interpreting Title IX to cover employment discrimination is consistent with these congressional objectives.

When we look at the Senate we note that on August 5, 1971, Senator Bayh introduced an amendment to a pending higher education bill, S. 659, for the purpose of prohibiting sex discrimination by certain educational institutions. In introducing his amendment he stated:

> While over 50 percent of our population is female, there is no effective protection for them as they seek admission *and employment* in educational facilities. The antidiscrimination provisions of the Civil Rights Act of 1964 do not deal with sex discrimination by our institutions of higher learning.
>
> * * * * *
>
> Today, women seeking *employment* in higher education face an array of obstacles almost as insuperable as those which used to face blacks.

117 Cong. Rec. 30155-56 (1971) (emphasis added). The next day, Senator McGovern stated his support for Senator Bayh's amendment, and in doing so referred to statistics that only nine percent of America's college professors were women, only six percent of law school students were women, and only eight percent of medical school students were women. 117 Cong. Rec. 30411 (1971). Senator Bayh's 1971 amendment did not come to a vote, since it was ruled "nongermane." *See* 118 Cong. Rec. 5808 (1972). Senator Bayh's remarks quoted above indicate at least an initial intention on his

part to prohibit employment discrimination under the provision of his 1971 amendment which subsequently formed the basis of § 901.

Senator Bayh introduced a new version of his amendment on February 28, 1972, as Amendment No. 874 to S. 659, which was still under consideration by Congress. 118 Cong. Rec. 5802-03 (1972). In addition to the provisions of the 1971 proposal, Senator Bayh included provisions amending Title VII of the Civil Rights Act of 1964 and amending § 13(a) of the Fair Labor Standards Act, 29 U.S.C. § 213(a), to exempt from the scope of that subsection the Equal Pay Act, 29 U.S.C. § 206(d).[9] The amendment was passed by the Senate the same day it was introduced. 118 Cong. Rec. 5815 (1972).

In introducing his amendment, Senator Bayh stated that "sex discrimination reaches into all facets of education—admissions, scholarship programs, *faculty hiring and promotion, professional staffing,* and pay scales." 118 Cong. Rec. 5803 (1972) (emphasis added). The Senator went on to say:

> Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs *and employment resulting from those programs* . . . . More specifically, *the heart of this amendment* is a provision banning sex discrimination in educational pro-

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9 That portion of Senator Bayh's amendment dealing with Title VII, contained in § 1005 of the amendment, was not ultimately enacted as part of Title IX because a similar provision had already been enacted as §§ 2 and 3 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e(a) and 2000e-1. The portion of the amendment dealing with the Equal Pay Act, contained in § 1009 of the amendment, was enacted as § 906(b)(1) of Title IX and is now part of 29 U.S.C. § 213(a).

> grams receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and *faculty employment, with limited exceptions.* Enforcement powers include fund termination provisions—and appropriate safeguards—parallel to those found in title VI of the 1964 Civil Rights Act. *Other important provisions* in the amendment would extend the equal employment opportunities provisions of title VII of the 1964 Civil Rights Act to educational institutions, and extend the Equal Pay for Equal Work Act to include executive, administrative and professional women.

Id. (emphasis added). Other courts have interpreted these remarks concerning the coverage of employment to refer not to the part of Senator Bayh's amendment that later became § 901(a) of Title IX, 20 U.S.C. § 1681(a), but rather to the amendment's provisions removing the exemption in Title VII for educational institutions and extending the protection of the Equal Pay Act to executive, administrative and professional positions. But Senator Bayh in his quoted remarks quite clearly referred to "faculty employment" in conjunction with the basic prohibition of his amendment and *then* referred to the "[o]ther important provisions" dealing with Title VII and the Equal Pay Act.

After making these introductory remarks, Senator Bayh in a prepared summary of his amendment divided the amendment into four parts and discussed each separately. 118 Cong. Rec. 5806-08 (1972). The first part of his summary is labeled "A. Prohibition of Sex Discrimination in Federally Funded Education Programs." Under this heading, Senator Bayh describes the

basic prohibition against sex discrimination and the enforcement provisions, noting that these sections "generally parallel the provisions of title VI." *Id.* at 5807. He also discusses the exclusions from coverage in this category It is in the second part of his discussion, labeled "B. Prohibition of Education Related Employment Discrimination," that Senator Bayh describes the amendments to Title VII and the Fair Labor Standards Act. While these headings at first blush tend to support the other courts' view, Senator Bayh's description of the *first* portion of his amendment shows that the basic prohibition of § 901 was meant to apply to employment discrimination:

> This portion of the amendment covers discrimination in all areas where abuse has been mentioned—*employment practices for faculty and administrators,* scholarship aid, admissions, access to programs within the institution such as vocational education classes, and so forth.

Id. (emphasis added).[10] This language strongly indicates that the first portion of the Act, containing § 901 and

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10 Senator Bayh made the following observations in introducing his revised amendment:

> I believe it is important to survey in some detail the scope of the problem in certain fundamental areas—hiring, scholarships, and admissions.
>
> A. Discrimination in Hiring and Promotion of Faculty and Administrators
>
> Discrimination against females on faculties and in administration is well documented and widespread abuse is clear. I have been dismayed to learn of the double standard the academic community has applied to those women who choose to make education their life work. In spite of high academic standards, a woman who has met the rigorous standards for a Ph.D. program may suddenly find that these same schools do not have sufficient confidence in their own standards to hire the graduate to teach. A recent report on Columbia University practices found that

its enforcement provisions, relates not only to discrimination against students and other beneficiaries,

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although the percentage of doctorates award to women rose from 13 to 24 percent between 1957 and 1968, the percent of women in tenured positions at the graduate facilities have remained constant—at slightly over 2 percent. Similar situations exist, according to testimony during the 1970 hearings at numbers of other schools.

Although women comprised 6.9 percent of those enrolled in law school in 1969, a survey of 36 prominent law schools during 1968-70 showed that out of a total of 1,625 faculty members, only 35 or 2.1 percent were women, and 25 percent of those 36 were classified as librarians.

. . . .

Furthermore, the rule is that once hired, women do not receive advancement as often as men. While almost half of the male teachers are given the status of full professor, only 10 percent of the women make it that far. As a result, the highest faculty ranks are weighted with men; the lowest rank with women:

Present Rank	*Men*	*Women*
Professor	24.5%	9.4%
Associate professor	21.9%	15.7%
Assistant professor	28.2%	28.7%
Instructor and below	25.3%	46.2%

Finally, those women who are promoted often do not receive equal pay for equal work. In 1965-66, at the instructor's level, the median annual salary of women was $410 less than that of male instructors; at the assistant professor's level it was $576 less; at the associate professor's level, $742 less; and at the level of full professorship, it was $1,119 less. "Fact Sheet on the Earnings Gap," U.S. Department of Labor, Women's Bureau, 1970. According to testimony submitted during the "1970 Hearings," the women at the University of Pittsburgh calculated that the University was saving $2,500,000 by paying women less than they would have paid men with the same qualifications.

Preference for men over women to fill administrative posts is just as clear. For instance, Dr. Peter Muirhead, Associate Commissioner of Education, testified during the "1970 Hearings" that more than two-thirds of the teachers in elementary and secondary schools are women, but they constitute only 22 percent of the elementary school principals and only 4 percent of the high school principals. According to a recent study by the National Education Association, only two women can be found among 13,000 school superintendents.

(footnote continued on next page)

but also to "employment practices for faculty and administrators." The *second* portion applies "title VII's widely recognized standards of equality of employment opportunity to educational institutions" and ensures that "both men and women employees receive equal pay for equal work" at such institutions. *Id.*[11]

While we are well aware of Justice Jackson's warning against selecting casual statements from floor debates, *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring), we at least get further reinforcement of the principal sponsor's views as expressed above by looking at the

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> In higher education, female administrators are virtually nonexistent. Dr. Ann Scott, from the University of Buffalo, highlighted the "progressive evaporation of women as we climb the academic ladder" by pointing out that while women are only 5 percent of the full professors at that institution, they are even less—1 percent—of the top administration "1970 Hearings." [*Sic.*] Even at women's colleges there has been a decline in recent years in the number of high administrative posts held by women. And as Dr. Bernice Sandler pointed out in a recent speech, if it were not for female presidents at Catholic colleges, the number of women college presidents would be less than the number of whooping cranes.
>
> 118 Cong. Rec. 5804-05 (1972).

11 There is some discrepancy in Senatory Bayh's breakdown of his amendment. The first part of his summary begins: "Central to my amendment are sections 1001-1005 . . . ." 118 Cong. Rec. 5807 (1972). Section 1005, however, is the section of Amendment No. 874 which contains the amendments to Title VII. Thus, an argument could be made that Senator Bayh's references to employment discrimination in this first portion actually are references to § 1005 rather than to the basic prohibition. It is clear from his discussion in the first two parts of the summary, however, that the first part was not meant to cover the Title VII provision, but only the basic prohibition, the enforcement mechanism and the exclusions. The discussion of the proposed amendment to Title VII does not come until the *second* part of the summary. Accordingly, we conclude that the mention of § 1005 of the amendment in the first part of the summary was simply an oversight.

debate on the Senate floor just prior to Senate passage of Title IX. In that debate Senator Pell, the floor manager of the entire education bill, addressed several questions to Senator Bayh concerning the scope of § 1001(a) and (b) of the Bayh Amendment, the predecessors of § 901(a) and (c) of Title IX. The following colloquy leaves little doubt that Senator Bayh intended employment practices to be covered under what is now § 901:

> MR. PELL. . . . Sections 1001(a) and (b) include all educational institutions which receive Federal assistance. This includes elementary and secondary schools as well. With regard to private undergraduate colleges, the Senator has excluded from coverage their admissions practices. Does the same exclusion apply to nonpublic institutions at the elementary and secondary level?
>
> MR. BAYH. At the elementary and secondary levels, admissions policies are not covered. As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, *and discrimination in employment within an institution, as a member of a faculty or whatever.*
>
> *In the area of employment, we permit no exceptions.* In the area of services, once a student is accepted within an institution, we permit no exceptions. The Senator from Rhode Island asked

about admissions policies of private secondary and primary schools. They would be excepted.

* * * * *

MR. PELL. . . . [D]o I understand the Senator to say that the faculty of private schools would have to reflect a sexual balance?

MR. BAYH. This amendment sets no quotas. It only guarantees equality of opportunity. The Senator from Indiana cannot be sure about the sexual balance in any faculty, but as far as employment opportunities are concerned, the answer would be "Yes."

* * * * *

MR. PELL. Would this apply to a parochial school where they have nuns *as teachers?*

MR. BAYH. No. *There is an explicit exception for education institutions controlled by a religious organization.*

* * * * *

MR. PELL. Mr. President, I refer to a preparatory school such as Peekskill Military Institute which is at the high school level. Would that school be expected to have *women teachers?*

* * * * *

MR. BAYH. *All military schools are excluded.*

118 Cong. Rec. 5812-13 (1972) (emphasis added).

It is clear from these questions and answers not only that Senator Bayh intended employment to be covered by § 901, but also that the exemptions for religious and military institutions now contained in § 901(a)(3) and

(4) apply to *employment* as well as to admissions and services. Obviously Senator Bayh's responses to Senator Pell that the employment practices of religious and military schools were covered by the exclusions in § 901(a) would make no sense if employment practices were not included within the scope of § 901(a) to begin with. Despite Justice Jackson's warning, such statements by the sponsor of a piece of legislation are at the very least helpful and may indeed be authoritative. *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760,* 377 U.S. 58, 67-68 (1964); *Schwegmann Brothers, supra,* 341 U.S. at 394-95.

We also note that one month after the Higher Education Amendments of 1972 containing Title IX were signed into law by the President, Senator Bayh published in the Congressional Record a summary of the requirements of Title IX prepared by Dr. Bernice Sandler of the Association of American Colleges. That summary's description of the basic prohibition of § 901(a) included a footnote which noted the following differences between Title IX and Title VI:

> Apart from admission coverage . . ., the Higher Education Act differs from Title VI in that the sex discrimination prohibition is limited to federally assisted *education* programs and activities, whereas the race, color and national origin discrimination prohibitions are applicable to *all* federally assisted programs. Title VI also specifically excludes *employment* from coverage (except where the primary objective of the federal aid is to provide employment). There is no similar exemption for employment in the sex discrimination provisions relating to federally assisted education programs.

118 Cong. Rec. 24684 n.1 (1972) (emphasis in original). Thus, after the Act's passage, the primary sponsor of Title IX adopted a summary of that title which expressly noted the distinction between Titles VI and IX in terms of employment coverage.

Turning to the House of Representatives, the House version of the amendments to the Higher Education Act of 1965 was simultaneously being considered as H.R. 7248. A provision on sex discrimination in educational institutions, similar to that introduced by Senator Bayh, was included in the bill reported by the House Committee on Education and Labor. *See* H.R. Rep. No. 554, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2462, 2511-12, 2566-67. The principal difference was the inclusion of § 1004 in the House bill, paralleling the language of § 604 of Title VI, which we have discussed above. The House Committee report states:

> *Section 1004* provides that nothing in this title may be taken to authorize action by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Id. at 2566 (emphasis in original). The Committee's bill was passed by the House on November 4, 1971 without any change in the provisions of § 1004 of the bill. 117 Cong. Rec. 39353-54 (1971). There was no specific discussion of § 1004 during the House debate. 117 Cong. Rec. 39248 *et seq.* (1971). As we have pointed out, this provision in the House bill went to the

conference committee, and the House receded. *See* note 8 *supra*.

It is not enough, we think, to say as the court below and the other circuits have suggested that the deletion of this provision in conference was simply to avoid inconsistency with the other provisions of the bill proposing to amend Title VII and the Fair Labor Standards Act, since Congress could easily have drafted an employment exclusion applicable solely to the first portion of the Act. For example, Congress could readily have said: "Nothing in § 901 shall apply to any employees of any educational institution subject to this title except where a primary objective of the Federal financial assistance is to provide employment." In light of the ease with which an appropriate employment exclusion could have been substituted, and in light of the Senate sponsor's view of his amendment as expressed in his summary and in the debates from which we have quoted above, we cannot agree that the omission was simply correction of a "drafting mistake." Rather, the deletion of the House provision supports HEW's broader interpretation of the Act. Appellees point us to no language anywhere in the legislative history that even suggests that the conference committee deleted the provision merely for reasons of consistency, and we have not been able to find any. In short, this was *not*, in our view, a matter of simply correcting legislative inadvertence.

It is not without significance that Congress itself undertook a statutorily mandated review of the Title IX regulations which are here challenged. That review procedure provided at the time that any regulation would become effective not less than 45 days after transmission "unless the Congress shall, by concurrent

resolution, find that the standard, rule, regulation or requirement is inconsistent with the Act from which it derives its authority, and disapprove such standard, rule, regulation or requirement." 20 U.S.C. § 1232(d)(1) (Supp. IV 1974). Senator Helms introduced such a concurrent resolution to disapprove all of the HEW regulations issued under Title IX including Subpart E. S. Con. Res. 46, 94th Cong., 1st Sess., 121 Cong. Rec. 17301 (1975). The resolution was referred to the Senate Committee on Labor and Public Welfare, which took no action on it. In the House, Representatives Quie and Erlenborn introduced an amendment to a concurrent resolution which amendment specifically sought to disapprove the employment sections of the regulations. Their amendment stated: "Subpart E . . . is inconsistent with the Act since by amendment to Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act of 1938, Congress has conferred such jurisdiction upon the United States Equal Employment Opportunity Commission and the Department of Labor." Unpublished Amendment to H.R. Con. Res. 330, Hearings Before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess. (1975) on file with that Committee. In testimony before the House Education and Labor Committee's Subcommittee on Postsecondary Education, Senator Bayh expressed support for the HEW regulations, stating that HEW's "[T]itle IX guidelines, as the Congress mandated, call for equality in admissions, financial aid, course offerings, career counseling, *and in the case of teachers and other educational personnel, employment, pay and promotions*." Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education of the

House Committee on Education and Labor, 94th Cong., 1st Sess. 173 (1975) (emphasis added). The concurrent resolution and amendment were never passed out of the Education and Labor Committee. Thus, no concurrent resolution was passed by either House, and HEW's regulations took effect.

Subsequent attempts to limit the scope of § 901 have also failed. Later in 1975, Senator Helms introduced a bill, S. 2146, proposing to amend § 901 along the lines that we have suggested could have been used by Congress in the first instance if Congress intended to exclude employment from coverage. His bill read in part: "Nothing in [§ 901 of Title IX] shall apply to any employees of any educational institution subject to this title." 121 Cong. Rec. 23845-47 (1975). His bill was not adopted. A year later, Senator McClure offered another amendment to limit the coverage of § 901 to the "curriculum or graduation requirements of the institutions" receiving federal aid. 122 Cong. Rec. 28136 (1976). Senator Bayh made the following remarks in opposition to the amendment:

> The impact of this amendment is enormous—it would exempt those areas of traditional discrimination against women that [were] the reason for the congressional enactment of Title IX. These areas would include scholarship aid, *employment and employment benefits* and extracurriculum activities such as athletics.

Id. at 28144 (emphasis added). Senator McClure's amendment was not adopted. *Id.* at 28147.

While Congress *later* amended the statute requiring congressional review of such regulations to provide that the failure to adopt a concurrent resolution disapprov-

ing a final regulation should not be construed as approval of the regulation or as a finding of consistency with the authorizing statute, 20 U.S.C. § 1232(d)(1), we think the failure of Congress here to adopt resolutions, *along with bills and amendments*, specifically designed to exempt employment from HEW regulation after hearing arguments on both sides provides some evidence that coverage was intended. *See Cannon v. University of Chicago, supra*, 441 U.S. at 703; *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14-16 (1941). Moreover, Congress has twice amended the coverage of Title IX when it has disagreed with HEW's interpretation of the statute. 20 U.S.C. § 1681(a)(8), (9). *See NLRB v. Bell Aerospace Co., supra*, 416 U.S. at 275; *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 313-14 (1933). We recognize that this review of subsequent congressional action with respect to the regulations is not conclusive, and we agree with the First Circuit that "Congressional inaction should not be lightly construed as approval," *Islesboro School Committee v. Califano, supra*, 593 F.2d at 428 n.3. Nonetheless, we think the congressional reaction to the Title IX regulations, in the context of the legislative history as a whole, lends some additional weight to the view that § 901 was expressly intended to relate to employment practices.

Nor is it particularly noteworthy that employment discrimination in educational institutions is now prohibited by Title VII and the Equal Pay Act. Overlapping jurisdiction in the area of employment discrimination is well recognized. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974). We visualize Congress as in effect saying

that individual employees may exercise their rights under either Title VII or the Equal Pay Act, but that HEW may use its powers to threaten to withdraw federal funds or actually withdraw them if necessary when a recipient of federal financial assistance practices discrimination on the basis of sex.[12]

We recognize the argument that purports to speak both to the heart and to "common sense,"—*i.e.*, that Congress could hardly have intended to penalize the students who are primary beneficiaries of a federally funded program simply because there is discrimination against teachers or staff. While this argument may have some initial appeal, we believe it to be superficial. HEW unquestionably has the authority to withhold funds when it finds that any *student* or group of *students* has been discriminated against in any educational program even when the vast majority of students in such a program have suffered no discrimination and would be hurt by the loss of funds. It is perfectly consistent, in our view, to find that Congress has given HEW the same authority to oversee sex discrimination in educational *employment* in light of the grave congressional concern over sex discrimination in that area. *See* note 10 *supra*. As we have indicated, our reading of the statutory scheme leads us to conclude that Congress intended HEW to have available the potent remedy of fund withdrawal to ensure compliance with the prohibition against sex discrimina-

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12 We note that HEW included in Subpart E an exemption, similar to that contained in § 703(e) of Title VII, 42 U.S.C. § 2000e-2(e), for those situations where sex discrimination can be justified as a "bona fide occupational qualification" (BFOQ). 45 C.F.R. § 86.61 (now 34 C.F.R. § 106.61 (May 9, 1980)). This eliminated the possible inconsistency that HEW could withdraw funds under Title IX for sex discrimination that is expressly authorized under the BFOQ exception of Title VII.

tion in employment rather than rely solely on the important, but usually piecemeal, sanctions available to aggrieved employees under Title VII and the Equal Pay Act.

Finally, while § 902 of Title IX requires that an order terminating federal financial assistance be "limited in its effect to the particular program or part thereof, in which . . . noncompliance has been . . . found," we disagree with the court below and the district court in *Romeo Community Schools, supra*, 438 F. Supp. at 1033, that this limitation "is implicitly a limitation on HEW's authority to regulate as well." Such a construction is contrary to the judicial approval given to broad HEW guidelines under Title VI of the Civil Rights Act of 1964, which also contains this language limiting fund termination. *See United States v. Jefferson County Board of Education*, 372 F.2d 836, 847-61 (5th Cir. 1966), *adopted en banc per curiam*, 380 F.2d 385, *cert. denied*, 389 U.S. 840 (1967). Moreover, employment discrimination is no less "program specific" than other practices recognized as subject to the provisions of Title VI and Title IX. For instance, discrimination in admissions to an institution's graduate schools is clearly prohibited by Title IX regardless of whether the discrimination occurs solely in one graduate program or all graduate programs. By the same token, employment discrimination might occur in one program or in more than one program. Nothing in § 902 requires HEW only to issue regulations directed at specific programs. Rather, we think the statute merely requires that any termination of funds be limited to the particular program or programs in which noncompliance with § 901 is found and does not require HEW to specify prior to termination which particular programs receiving financial assistance are covered by its regulations.

In order to terminate federal assistance to a particular program under Title IX, HEW is required to show that there has been sex discrimination in that program. And if discrimination occurs throughout an entire educational system, that system can be considered one "program" under Title IX or Title VI for purposes of terminating funds. *See Jefferson County, supra*. But the question of the scope of HEW's authority to terminate funds is different from the question whether HEW is authorized by § 901 of Title IX to issue broad regulations prohibiting sex discrimination in employment. The latter question we answer in the affirmative, and hence do not reach the question whether HEW has authority to issue regulations which prohibit sex discrimination in employment to the extent that it constitutes discrimination against students—the so-called question of "infection." [13]

Because of its holding that HEW had no authority to issue employment regulations under Title IX, the district court did not take any evidence on the questions whether North Haven or Trumbull engaged in any discrimination on the basis of sex or whether, if so, any fund termination had to be limited to a particular program or particular programs. In reversing the summary judgments granted by the district court in favor of the school boards, we express no view as to whether the HEW regulations were actually violated or what remedies, if any, might be appropriate. We merely hold that HEW has authority under Title IX to promulgate the employment discrimination regulations at issue here.

We accordingly reverse the judgment below and remand the cause for further proceedings.

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13 *See* note 6 *supra* and accompanying text.

APPENDIX C

UNITED STATES COURT OF APPEALS

Second Circuit

Nos. 79-6136, 79-6247, 79-7747

OCTOBER 24, 1980

NORTH HAVEN BOARD OF EDUCATION,

Plaintiff-Appellee,

v.

SHIRLEY M. HUFSTEDLER, et al.,

Defendants-Appellants.

TRUMBULL BOARD OF EDUCATION,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF EDUCATION and LINDA POTZ,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellees, The North Haven Board of Education and The Trumbull Board of Education,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/s
A. Daniel Fusaro
Clerk

APPENDIX D-1

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NORTH HAVEN BOARD OF EDUCATION	)	CIVIL
	)	ACTION
v.	)	
	)	NO.
CALIFANO	)	N-78-165

MEMORANDUM OF DECISION

NORTH HAVEN BOARD OF EDUCATION v. CALIFANO, Secretary of Health, Education and Welfare, et al., No. N-78-165, April 24, 1979, as amended April 26, 1979

BURNS, District Judge: -

Plaintiff school board seeks declaratory and injunctive relief against the defendants for threatened termination of federal aid. Before the court at this time are defendants' motion to dismiss or, in the alternative, for summary judgment and plaintiff's cross motion for summary judgment. In light of the unusual unanimity among the federal judiciary with regard

to the issue at hand, defendants' motion for summary judgment is denied and plaintiff's cross motion for summary judgment is granted.

The facts alleged by plaintiff are as follows: Plaintiff North Haven Board of Education (hereinafter Board) is a duly elected municipal body of the Town of North Haven and of the State of Connecticut, charged with the responsibility of operating all public schools within the town. Defendant Califano is the Secretary of the United States Department of Health, Education and Welfare (hereinafter HEW). Defendant John G. Bynoe, Director of the Office for Civil Rights, Region I of HEW, sent a letter, dated January 10, 1978, to plaintiff stating that a complaint had been filed against the board for alleged discrimination with

respect to hiring and child care leave.[1] On three occasions in February, March, and April, 1978, plaintiff asked the defendants either to dismiss the complaint for lack of jurisdiction or to hold it in abeyance pending court resolution of the underlying complaint. Letters dated April 19, 1978 and April 27, 1978 sent from defendants to plaintiff both stated the board's failure to provide certain information indicated the

[1] The complainant, Elaine Dove, alleged that after receiving tenure as a teacher of special education with the plaintiff North Haven Board of Education, she left her position following the birth of her second child. One year later, she applied for a position similar to the one she previously had held; when the job was given to another applicant, Dove complained of discrimination on the basis of her parental status and leave for pregnancy. A lawsuit has been filed in this court. Dove v. North Haven Board of Education, Civil No. B77-501 (D. Conn., filed Dec. 23, 1977).

possibility of administrative enforcement. Federal financial aid from HEW to plaintiff for the academic years 1975-76, 1976-77, and 1977-78 was $95,269, $86,905, and $111,212, respectively. Plaintiff alleges that the administrative regulations under which HEW proceeded are invalid, void, and of no effect whatsoever.

This suit arises under the Education Amendments of 1972 (hereinafter Title IX), codified at 20 U.S.C. §§ 1681-1686. 20 U.S.C. § 1681 provides in pertinent part:

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . .

Several exceptions, not relevant here, are permitted.[2] 20 U.S.C. § 1681 gives

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[2]Briefly, the following are exempted from 20 U.S.C. § 1681: admissions to educational institutions other than vocational education, professional education, graduate higher education, and public undergraduate higher education (subsection (a)(1)); admission to educational institutions in the process of changing from a single-sex to a co-educational admissions policy (subsection (a)(2)); religious schools if the application of Title IX would be contrary to the organization's religious tenets (subsection (a)(3)); military academies (subsection (a)(4)); admissions to public institutions of undergraduate higher education which traditionally have admitted members of only one sex (subsection (a)(5)); membership in social fraternities and sororities (subsection (a)(6)(A)); membership in voluntary service organizations which traditionally have been limited to members of one sex, such as the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, and Camp Fire Girls (subsection (a)(6)(B)); conferences (and promotions and selections therefor) such as Boys State, Girls State, Boys Nation, and Girls Nation (subsection (a)(7)); father-son and mother-daughter activities at educational institutions

statutory authority to HEW to promulgate "rules, regulations, or orders of general applicability" to achieve the objectives of Title IX. In accordance with this authority, HEW issued regulations entitled "Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance," effective July 21, 1975. These regulations are found at 45 C.F.R. §§ 86.1 to 86.71. At issue in this case is Subpart E, entitled "Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited," 45 C.F.R. §§ 86.51 to 86.61, especially

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(subsection (a)(8)); and scholarship awards in "beauty" pagenats [sic] (subsection (a)(9)).

45 C.F.R. § 86.57, dealing with marital or parental status.[3]

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[3] 45 C.F.R. § 86.57 reads in full:

(a) General. A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) Pregnancy. A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) Pregnancy as a temporary disability. A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes,

The validity of Subpart E has been before the federal judiciary on eight different occasions, and in each case, the promulgation of these regulations was held to be beyond the statutory

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including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) Pregnancy leave. In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

authority of HEW because the purpose of Title IX is the prohibition of sex discrimination against students and other direct beneficiaries of federal educational assistance funds and therefore Title IX does not cover the employment practices of educational institutions which receive these funds. Isleboro School Committee v. Califano, No. 78-1302, 593 F.2d 424, 19 FEP Cases 172 (1st Cir. Mar. 9, 1979), aff'g sub nom. Brunswick School Board v. Califano, 449 F. Supp. 866, 17 FEP Cases 475 (D. Me. 1978); Auburn School District v. HEW, Civil No. 78-154, 19 FEP Cases 1504 (D.N.H. Mar. 29, 1979); Board of Education of the Bowling Green City District v. HEW, No. C 78-177, 19 FEP Cases 457 (N.D. Ohio Mar. 14, 1979); University of Toledo v. HEW, No. C 77-235, 464 F. Supp.

693, 19 FEP Cases 108 (N.D. Ohio Jan. 31, 1979); Junior College District of St. Louis v. Califano, 455 F. Supp. 1212, 18 FEP Cases 88 (E.D. Mo. 1978); Dougherty County School System v. Califano, No. 78-30-ALB, 19 FEP Cases 688 (M.D. Ga. Aug. 22, 1978); Seattle University v. HEW, No. C 77-631S, 16 FEP Cases 719 (W.D. Wash. Jan. 3, 1978), appeal docketed, No. 78-1746 (9th Cir. Apr. 6, 1978); Romeo Community Schools v. HEW, 438 F. Supp. 1021, 14 FEP Cases 1177 (E.D. Mich.), appeal pending Nos. 77-1691 & -1692 (6th Cir. May 18, 1977). Although none of these cases originated within this circuit, this court is persuaded by the reasoning of the opinions and adopts it as its own.[4]

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[4]Many of the arguments presented in these opinions were forecast in Kuhn,

The most detailed analysis of 20 U.S.C § 1681 and these regulations is found in Romeo Community Schools v. HEW, supra. The court's decision was premised upon five basic grounds. First, the court took a broad view of the entire Title IX legislative package. Comparisons were made between Title VI of the Civil Rights Act of 1964, codified at 42 U.S.C. §§ 2000d to 2000d-5. However, one important difference between Title VI and Title IX was observed: Title VI contains a provision explicitly excluding discrimination in employment, found in 42 U.S.C. § 2000d-3.[5] HEW attributed

"Title IX: Employment and Athletics are Outside HEW's Jurisdiction." 65 Geo. L.J. 49, 50-62 (1976).

[5] 42 U.S.C. § 2000d-3 provides in full:

Nothing contained in this subchapter shall be construed to authorize action

significance to the absence of a specific exclusion in Title IX. The district court rejected this construction, finding that

> [T]his discrepancy must be traced to the fact that Title IX was enacted as part of a larger legislative program which also included an amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., enlarging the scope of that provision to include sex discrimination in employment, as well as an amendment to the Equal Pay Act, giving the Secretary of Labor authority to regulate sex discrimination in educational employee compensation. 29 U.S.C. § 206(d). A provision similar to (42 U.S.C. § 2000d-3) was left out of this package in order to avoid the inherent contradiction between such a provision and these amendments.

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under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

438 F. Supp. at 1030, 14 FEP Cases at 1184 (footnote omitted) (emphasis in original). Second, the court focused solely upon the statutory language of 20 U.S.C. § 1681 and held that the section addressed itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs:

> Section 1681 must therefore be read to protect from sex discrimination only those persons for whom the federally assisted education programs are established, and this can only mean the school children in those programs. As a reference to faculty employees, the language of § 1681 is indirect, if not obscure. Teachers participate in these programs only to the extent that they may teach and help administer some of them; teachers benefit from these programs only to the extent that the funds for them may be used to pay their salaries: teachers are "subjected to discrimination <u>under</u>" these programs, (emphasis added), only

> to the extent that the programs themselves may be established and operated in an employment-related discriminatory way. Teachers, in short, are hard pressed to fit themselves within the plain meaning of § 1681's prohibitory language, general as it may appear on its face.

Id. at 1031-32, 14 FEP Cases at 1185. A third factor was that the express exclusions in subsection 1681(a) relate solely to student activity or enrollment.[6]

The fourth and fifth grounds concentrated upon the enforcement mechanism of Title IX, 20 U.S.C. § 1682 provides in pertinent part:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom

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[6] See note 2 supra.

> there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

Termination of federal funds is the only sanction authorized. As the court observed, the termination of a school program penalizes the students, but Congress apparently had engaged in a cost-benefit analysis to determine that any benefit

that students might derive from the education programs funded by HEW was more than outweighed by the sex discrimination in those programs. Id. at 1032. However, the termination weapon would be ineffective against sex discrimination in employment, having no enforcement value: "The court doubts that Congress would resort to such an arbitrary enforcement measure where alternative methods of prohibiting employment discrimination, more effective and less costly than this, are readily available." Id. at 1032-33. The second aspect of § 1682 is that the termination is "limited in its effect to the particular program, or part thereof, in which such non-compliance has been found." This "program specificity" rule requires HEW to make a program-by-program analysis. As the court found,

> Regulation of employment practices, however, is inherently non-"program specific." An educational institution's employment policies are general in nature, covering, by and large, all faculty employees involved in all of an institution's education programs, whether federally funded or not . . . . Compliance with HEW's regulations under Subpart E will inevitably require modifications of employment policies which apply generally to all faculty employees and education programs throughout the system. Yet the federal interest involved here, as defined by the scope of §§ 1681 and 1682, is much narrower and does not appear to justify this kind of regulatory leverage.

Id. at 1033, 14 FEP Cases at 1186-87. Thus the court concluded that Subpart E was "patently overbroad." Id.

The Romeo decision has been extended to HEW's capacity to investigate alleged sex discrimination in Board of Education of the Bowling Green City District v. HEW, supra, and University of

Toledo v. HEW, supra. In these nearly identical opinions, Judge Walinski ruled that HEW lacks the authority to investigate the employment practices of the plaintiff in order to determine an educational institution's overall compliance with Title IX. In the absence of jurisdiction to regulate employment practices, HEW similarly had no jurisdiction to investigate such practices. Slip ops. at 4-5.

Defendants' reliance upon Piasick v. Cleveland Museum of Art, 426 F. Supp. 779, 14 FEP Cases 33 (N.D. Ohio 1976) and United States v. City of Chicago, 395 F. Supp. 329, 16 FEP Cases 1279 (N.D. Ill.), aff'd mem. 525 F.2d 695 (7th Cir. 1975), is misplaced. The First Circuit effectively disposed of these cases in Islesboro School Committee v.

Califano, supra. The Islesboro opinion correctly observed that whatever comments were made in Piascik were dicta at best. Slip op. at 9-10, construing 426 F. Supp. at 780-81 n.1. The Chicago case was inapposite as it concerned financial aid granted under the federal revenue sharing programs, which "embod[y] an entirely different legislative scheme from the Education Act and its Amendments." Slip. op. at 10-11.

Lastly, defendants invoke what is called the "infection theory," having its genesis in United States v. Jefferson County Board of Education, 372 F.2d 836, 884-86 (5th Cir. 1977), aff'd en banc, 380 F.2d 385 (5th Cir.), cert. denied sub nom. Board of Education of City of Bessemer v. United States, 389 U.S. 840 (1967) and in Board of Public Instruction

of Taylor County, Florida v. Finch, 414 F.2d 1068, 1078 (5th Cir. 1969). In these Title VI cases, the courts stated that HEW administrative action may be warranted if it has been demonstrated that the elimination of discrimination against students in [sic] impossible without also eliminating discrimination against faculty. However, the court in Romeo explicitly rejected the "infection theory" in a Title IX context: "Whatever its validity or significance, however, the possibility of such a discriminatory infection does not authorize HEW to regulate employment practices for their own sake, and that quite clearly is what HEW purports to do through Subpart E of its Title IX regulations." 438 F. Supp. at 1035. The Isleboro court agreed, adding that there must be a clear nexus

between the sexual discrimination against employees and its effect upon students. Slip op. at 11.

Accordingly, it is

ORDERED that defendants' motion to dismiss or, in the alternative, for summary judgment, is denied.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is granted.

IT IS FURTHER ORDERED that the regulations set forth in 45 C.F.R. §§ 86.51 to 86.61, inclusive, are declared invalid, void, and of no effect whatsoever.

IT IS FURTHER ORDERED that defendants, their agents, employees, and persons acting in concert or participation with them are permanently enjoined from terminating or refusing to grant,

or attempting to terminate or refuse to grant, federal financial assistance to plaintiff for any alleged noncompliance with said regulations.

SO ORDERED

APPENDIX D-2

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NORTH HAVEN BOARD OF EDUCATION	)	
	)	CIVIL
v.	)	
	)	NO.
JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL	)	N-78-165

AMENDMENT TO MEMORANDUM OF DECISON

The court's memorandum of decision, filed April 24, 1979, is amended so that footnote 2 shall read as follows:

2/ Briefly, the following are exempted from 20 U.S.C. § 1681: admissions to educational institutions other than vocational education, professional education, graduate higher education, and public undergraduate higher education (subsection (a)(1)); admission to educational institutions in the process of changing from a single-sex to a co-educational admissions policy (subsection

(a)(2)); religious schools if the application of Title IX would be contrary to the organization's religious tenets (subsection (a)(3)); military academies (subsection (a)(4)); admissions to public institutions of undergraduate higher education which traditionally have admitted members of only one sex (subsection (a)(5)); membership in social fraternities and sororities (subsection (a)(6)(A)); membership in voluntary service organizations which traditionally have been limited to members of one sex, such as the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, and Camp Fire Girls (subsection (a)(6)(B)); conferences (and promotions and selections therefor) such as Boys State, Girls State, Boys Nation, and Girls Nation (subsection

(a)(7)); father-son, and mother-daughter activities at educational institutions (subsection (a)(8)); and scholarship awards in "beauty" pageants (subsection (a)(9)).

SO ORDERED

/s/
ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this 26th day of April, 1979.

APPENDIX E-1

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

THE TRUMBULL BOARD OF EDUCATION	)	
	)	CIVIL
v.	)	ACTION
	)	
UNITED STATES DEPARTMENT OF HEALTH, EDUCATION & WELFARE and LINDA POTZ	)	NO.
	)	B-78-401

MEMORANDUM OF DECISION

For the same reasons set forth in this court's ruling in North Haven Board of Education v. Califano, Civil No. N-78-165 (D. Conn. Apr. 24, 1979), plaintiff's motion for summary judgment is granted.

SO ORDERED

/s/
ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this 24th day of May, 1979.

APPENDIX E-2

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

THE TRUMBULL BOARD OF EDUCATION	)	
	)	CIVIL
v.	)	ACTION
	)	
UNITED STATES DEPARTMENT OF HEALTH, EDUCATION & WELFARE and LINDA POTZ	)	NO.
	)	
	)	B-78-401

MEMORANDUM OF LAW DENYING MOTION OF DEFENDANT POTZ TO SET ASIDE ORDER OF SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF, GRANTING PLAINTIFF'S MOTION TO AMEND JUDGMENT, AND DENYING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant Linda Potz was a guidance counselor for the plaintiff Trumbull Board of Education. Upon a complaint of sex discrimination filed with the United States Department of Health, Education & Welfare (hereinafter HEW) by Potz, HEW conducted an investigation of plaintiff's employment practices after which it found the plaintiff

board guilty of violating certain provisions of Title IX of the Education Amendments of 1972 (hereinafter Title IX), codified at 20 U.S.C. §§ 1681-1686, specifically in job assignments, working conditions, and non-renewal of Potz's contract. HEW thereafter threatened to terminate plaintiff's federal aid if certain assurances toward compliance were not made. Plaintiff brought this suit, alleging that certain HEW regulations, 45 C.F.R. §§ 86.51 to 86.61, entitled "Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited," exceeded HEW's rule-making authority pursuant to 20 U.S.C. § 1681. This court granted plaintiff's motion for summary judgment on May 24, 1979, based upon its prior decision in North Haven Board of Education v.

Califano, Civil No. N78-165 (D. Conn. Apr. 24, 1979), which invalidated the same regulations in question here. Defendant Potz has moved to set aside the prior ruling in light of the United States Supreme Court decision in Cannon v. University of Chicago, 47 U.S.L.W. 4549 (U.S. May 16, 1979). Defendant Potz's motion is denied, for the court finds that the Cannon opinion has no significant ramifications upon the result reached here and in the North Haven case.

20 U.S.C. § 1681(a) provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits or, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . .

(Emphasis added). Despite this broad language, every federal court which has

confronted directly the validity of 45 C.F.R. §§ 86.51 to 86.61 has held that these regulations exceed HEW's statutory authority because Title IX's purpose is to prohibit sex discrimination against students and other direct beneficiaries of federal educational assistance funds and not against employees of educational institutions which receive federal funds. Romeo Community Schools v. HEW, 48 U.S.L.W. 2021 (6th Cir. June 20, 1979), aff'g 438 F. Supp. 1021 (E.D. Mich 1977); Junior College District of St. Louis v. Califano, 47 U.S.L.W. 2700 (8th Cir. Apr. 19, 1979), aff'g 455 F. Supp. 1212 (E.D. Mo. 1978); Isleboro School Committee v. Califano, 593 F.2d 424 (1st Cir. 1979), aff'g sub nom. Brunswick School Board v. Califano, 449 F. Supp. 866 (D. Mo. 1978); North Haven Board of Education v.

Califano, Civil No. N78-165 (D. Conn. Apr. 24, 1979), Auburn School District v. HEW, Civil No. 78-154 (D.N.H. Mar. 29, 1979); Board of Education of the Bowling Green City District v. HEW, No. C 78-177 (N.D. Ohio Mar. 14, 1979); University of Toledo v. HEW, 464 F. Supp. 693 (N.D. Ohio 1979); Dougherty County School System v. Califano, No. 78-30-ALB (M.D. Ga. Aug. 22, 1978); Seattle University v. HEW, No. C 77-6315 (W.D. Wash. Jan. 3, 1978), appeal docketed, No. 78-1746 (9th Cir. Apr. 6, 1978). See Siegel, Circuits Exclude Teachers From Coverage for Bias Under Title IX, Nat'l L.J., May 28, 1979, at 22, col. 1.

Defendant Potz argues that the Cannon opinion mandates a broad construction of 20 U.S.C. § 1681(a). Petitioner Cannon complained that she had been

denied admission to respondent's medical school because she was a woman. Both the district and circuit courts had dismissed Cannon's complaint on the grounds that there was no implied private right of action under Title IX, in the absence of explicit statutory authorization. The Supreme Court reversed, relying upon the four-prong test developed in Cort v. Ash, 422 U.S. 66 (1975). The Court analogized Title IX to Title VI of the Civil Rights Act of 1964, codified at 42 U.S.C. §§ 2000d to 2000d-5, under which the court previously had found a private right of action. The Court urged that Title IX and Title VI be given similar statutory construction:

> The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.

. . .

> . . . In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.

47 U.S.L.W. at 4553-54.

Despite the statutory similarity between Title IX and Title VI, there is one significant difference -- Title VI contains an explicit exclusion exempting discrimination in employment:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. § 2000d-3. This distinction was not at issue in Cannon, where the

alleged discrimination concerned admissions policy, not employment. Defendant Potz argues that the absence of such an exclusionary provision means that Congress deliberately meant to include employment issues within Title IX's ambit. This same argument, advanced by HEW in prior rulings, was rejected by the 6th Circuit in Romeo Community Schools v. HEW, 48 U.S.L.W. 2021 (6th Cir. June 20, 1979), aff'g 438 F. Supp. 1021 (E.D. Mich. 1977):

> . . . Title IX does not stand alone. It is part of a mosaic of federal statutes which protect the rights of women and minorities. Two of the pre-existing federal laws which prohibited discrimination in employment were amended by § 906 of Pub. L. 92-318, the same statute which contained the operative and enforcement provisions of Title IX (§§ 1681 and 1682). These amendments to the Equal Employment Opportunities Act, Title VII of the 1964

> Civil Rights Act, 42 U.S.C. § 2000e, and the Equal Pay Act, 29 U.S.C. § 213(a), brought employees of educational institutions engaged in educational activities within their coverage and prohibited discrimination on the basis of sex. The inclusion of these amendments to existing laws which closed loopholes relating to employment practices required that Pub. L. 92-318, for consistency, not contain a disclaimer similar to that contained in Title VI. The elimination of this language does not indicate that Title IX was intended to cover employment practices. Rather it reflects the fact that at that point in the legislative process such a provision in Pub. L. 92-318 would have been inaccurate and contradictory in light of this statute's extension of existing laws to cover employment practices of educational institutions.

Slip op. at 5-6 (footnote omitted). It is interesting to note that the appellate decision in Romeo was issued more than a month after the Cannon opinion.

Defendant Potz also quotes at length from Senator Bayh, whose statements do mention employment discrimination. 118 Cong. Rec. 5803, 5807 (1972). The 6th Circuit was not influenced by these quotations for it found that the statements referred to § 906 of the bill then under consideration, which section consisted of the amendments to the Civil Rights Act of 1964 and the Equal Pay Act. Romeo, Slip op. at 6-7. Moreover, even were Senator Bayh's statements applicable, other excerpts from Title IX's legislative history would suggest that Title IX's focus was upon students and other direct beneficiaries. For example, Representative Mink stated:

> Any college or university which has (a) policy which discriminates against women applicants . . . is free to do so under

> (Title IX) but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access.

117 Cong. Rec. 39252, quoted in 47 U.S.L.W. 4556 n.36.

Defendant Potz also stresses that Piascik v. Cleveland Museum of Art, 426 F. Supp. 779 (N.D. Ohio 1976), was cited wth approval in Cannon. 47 U.S.L.W. 4556 n.40. However, the relevant material in Piascik (426 F. Supp. at 780-81 n.1) was dicta at best. Isleboro School Committee v. Califano, 593 F.2d at 429.

The only aspect of the district court opinion in Romeo which may have been modified by Cannon is the district court's discussion of 20 U.S.C. § 1682 as

the enforcement mechanism of Title IX. 438 F. Supp. at 1032-33. The Cannon opinion makes clear that the termination of federal financial support for educational institutions is not the only remedy available under Title IX.[1] However, this is but one element of the

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[1] The 6th Circuit's position on this issue, in the wake of Cannon, is unclear, especially because the Cannon ruling is not mentioned in the Romeo decision. The 6th Circuit appears to acknowledge a right of private action under Title IX when it refers to the discontinuance of federal financial assistance as "the means of effecting compliance which is most available to HEW but then describes it as "the primary means contemplated by the enforcement provisions contained in § 1682." Romeo, slip op. at 6. (emphasis added) The 6th Circuit then continues:

> When this sanction is applied one result is that the students who are engaged in the federally funded activities suffer. This may be a reasonable burden for the students to bear when the object is to prevent or put an end to discrimination

Romeo opinion, and the decision still rests securely on its other bases.

The court's position in this and the North Haven case is not inconsistent with Cannon, for prior to the Supreme Court opinion this court had ruled that there is a private right of action under Title IX. Price v. Yale University,

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against students. However, it is unreasonable to assume that Congress intended for students in a school system to be deprived of the benefits of federal funding as a means of enforcing individual rights of teachers and other school employees. This is particularly true in view of the fact that the same bill included the amendments which gave school employees direct and superior remedies for sex discrimination provided in Title VII of the 1964 Civil Rights Act. These remedies involve no loss of student benefits.

Id.

Civil No. N77-277 (D. Conn. Dec. 21, 1977) (Latimer, Magistrate). Together these cases stand for the proposition that a student or direct beneficiary may bring a private suit against an educational institution receiving federal funds for alleged sex discrimination but that Title IX does not extend to alleged sex discrimination in employment practices by such an institution.

Lastly, defendant Potz raises the same "infection theory" advocated by HEW in the North Haven case. While the allegedly discriminatory action by the plaintiff board presents a stronger case for adopting this theory in the instant case than under the facts of the North Haven case, the court does not find that there is a clear nexus between the sexual discrimination against employees and its

effect upon students. Isleboro, 593 F.2d at 430.

In sum, defendant Potz's motion to set aside the ruling of May 24, 1979, which granted summary judgment for the plaintiff, is denied, as the court holds that the Cannon decision does not disturb this court's earlier ruling.

Lastly, plaintiff moves to amend the judgment to include specific injunctive and declaratory relief in a form substantially similar to that entered in the North Haven case. This motion is granted, so that the concluding paragraphs of the May 24, 1979 memorandum of decision read as follows:

"Accordingly, it is

"ORDERED that plaintiff's motion for summary judgment is granted.

"IT IS FURTHER ORDERED that the regulations set forth in 45 C.F.R. §§ 86.51 to 86.61, inclusive, are declared invalid, void, and of no effect whatsoever.

"IT IS FURTHER ORDERED that defendants, their agents, employees, and persons acting in concert or participation with them are permanently enjoined from terminating or refusing to grant, or attempting to terminate or refuse to grant, federal financial assistance to plaintiff for any alleged noncompliance with said regulations."

In light of this ruling, the court denies defendant Potz's cross-motion for summary judgment, which was not yet briefed by plaintiff, pursuant to an agreement with this court.

SO ORDERED

/s/
ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut,

this ____ day of September, 1979.

Office-Supreme Court, U.S.
FILED
SEP 4 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-986

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE NORTH HAVEN BOARD OF EDUCATION,
Petitioner

v.

TERREL H. BELL, ET AL.

THE TRUMBULL BOARD OF EDUCATION,
Petitioner

v.

UNITED STATES DEPARTMENT OF EDUCATION and
LINDA POTZ

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' APPENDIX

PETITION FOR WRIT OF CERTIORARI: FILED DECEMBER 16, 1980
WRIT OF CERTIORARI: GRANTED FEBRUARY 23, 1981

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No.: H78-165

[Filed May 26, 1978]

NORTH HAVEN BOARD OF EDUCATION, consisting of Stewart Fritts, Beverly Goodman, William Kennedy, Nancy Meikle, Margaret Pearce, Frank Porto, Anthony Rescigno, Jacquelyn Bechir, and Faye Clarke, PLAINTIFFS

v.

JOSEPH A. CALIFANO, JR., Individually and in his official capacity as United States Secretary of Health, Education and Welfare, and

JOHN BYNOE, Individually and in his official capacity as Director, Office for Civil Rights, Region I, United States Department of Health, Education and Welfare, and

MARIA C. MONTALVO, Individually and in her official capacity as Chief, Elementary and Secondary Education Branch, Office for Civil Rights, Region I, United States Department of Health, Education and Welfare, DEFENDANTS

COMPLAINT

INTRODUCTORY STATEMENT

This is an action for declaratory and injunctive relief against the Defendants for threatened termination of federal financial assistance to North Haven Board of Education (hereinafter the "Board").

JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to 5 U.S.C. §§ 701-706 and 28 U.S.C. §§ 1331, 1361, 2201

and 2202. The amount in controversy exceeds $10,000 exclusive of interest and costs.

PARTIES

2. Plaintiff, North Haven Board of Education, is a duly elected municipal body and state agency of the Town of North Haven and of the State of Connecticut, charged with the responsibility for operating all the public schools therein. Stewart Fritts, Beverly Goodman, William Kennedy, Nancy Meikle, Margaret Pearce, Frank Porto, Anthony Rescigno, Jacquelyn Bechir, and Faye Clarke are the duly elected members of said school board.

3. Defendant Joseph A. Califano, Jr. is an officer of the United States and is sued individually and in his official capacity as Secretary of Health, Education and Welfare.

4. Defendant John G. Bynoe is an officer of the United States and is sued individually and in his official capacity as Director, Office for Civil Rights, Region I, United States Department of Health, Education and Welfare.

5. Defendant Maria C. Montalvo is an officer of the United States and is sued individually and in her official capacity as Chief, Elementary and Secondary Education Branch, Office for Civil Rights, Region I, United States Department of Health, Education and Welfare.

THE ACTION

6. This is an action for declaratory judgment and injunctive relief arising under the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.*, as amended, (hereafter "Title IX" or "Section 901").

7. The matter in controversy exceeds exclusive of interest and cost, the sum of ten thousand dollars, ($10,000).

8. Jurisdiction is based on 5 U.S.C. §§ 701-706 and 28 U.S.C. §§ 1331, 1336, 2201 and 2202.

9. Section 901 provides in relevant part:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . ."

10. Section 902 of Title IX provides in relevant part:

> "Each federal department and agency which is in power to extend federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guarantee, is authorized and directed to effectuate the provisions of Section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken . . ."

11. Defendant Califano's predecessor in office issued regulations entitled "Final Title IX Regulations Implementing Educational Amendments Active [*sic*] 1972 Prohibiting Sex Discrimination in Education.", 45 C.F.R. Part 86, effective July 21, 1975 (hereafter "HEW Regulations"). The Regulations have the force of law; they are in final, approved form and are currently in effect.

12. Subpart E of the HEW Regulations purports to prohibit discrimination on the basis of sex in employment, (copy attached as Exhibit "A").

13. Under Section 902, the Department of Health, Education and Welfare is empowered to investigate reported violations of Section 901 and to initiate administrative proceedings to enforce compliance if voluntary compliance cannot be secured. Refusals to comply can be sanctioned under Section 902 with the termination of federal aid for those programs affected by a school's alleged discriminatory policies.

14. By letter of January 10, 1978, the Board was notified by Defendant Bynoe that a complaint had been filed against the Board alleging sex discrimination in hiring and other terms and conditions of employment including child care leave, (copy attached hereto as Exhibit "B").

15. The Defendant requested and received a copy of the complaint that was filed on December 21, 1977 and of the amended complaint that was filed on February 7, 1978.

16. On February 7, 1978 the Plaintiff requested the Department of HEW to dismiss the charge because three district courts had ruled that HEW had no jurisdiction to regulate employment discrimination and had held such regulations invalid, void and of no effect whatsoever.

17. By letter of March 17, 1978, the Assistant Regional Attorney for HEW refused to dismiss the complaint and advised the Office of Civil Rights to pursue an investigation of compliance.

18. By letter of March 21, 1978, the Plaintiff disagreed with the position of HEW in the letter of March 17, 1978 and asked HEW to hold investigation in abeyance pending court determination in *Dove* v. *Fritts*, Civil Action No. N77-501, as that very issue of HEW's jurisdiction over alleged employment discrimination was already before a Connecticut District Court.

19. By letter of April 5, 1978, HEW refused to hold the investigation in abeyance and said that failure to provide the necessary information could lead to the district's ineligibility to receive federal funds and other sanctions.

20. By letter of April 12, 1978, the Plaintiffs again asked the Defendant to dismiss the complaint for lack of jurisdiction or at least to hold it in abeyance pending court decision.

21. By letter of April 19, 1978, Mr. Bynoe said that failure to provide the information requested left them "no other alternative but to refer this case to the Office

of the Regional Attorney for possible administrative enforcement." (Copy attached as Exhibit "C").

22. By letter of April 24, 1978, the Plaintiffs asked the Defendants to specify the nature of the enforcements proceedings.

23. On April 27, 1978 the Plaintiff received a letter from the Defendants saying "I also want to inform you that this complaint file was referred to the Regional Attorney for possible enforcement proceedings on April 24, 1978. You may still avoid enforcement action by advising your client to submit the information as originally requested." (Copy attached as Exhibit "D").

24. Compliance with the HEW demands to submit to an investigation would require considerable time and expense by the Board; it would be forced to modify its existing collective bargaining agreement which, although the Board grants paid maternity disability leave, the granting of a year's personal leave of absence is a discretionary matter for the Board alone to decide. (Article XIX, copy attached as Exhibit "E").

25. The total amounts of federal financial assistance extended to North Haven from HEW for the school year, 1975-76, 1976-77, 1977-78 were approximately $95,269, $86,905, $111,212. These amounts included $24,307.50 for special education; $65,474 for children of low income families; $14,188 under the vocational education act;

26. The termination of said federal financial assistance, as threatened, would result in the elimination or, at least, substantial curtailment of the above continuing programs which would inure to the detriment of North Haven and cause irreparable harm to it, the students and the citizens that it by law represents.

27. The foregoing threatened loss and harm to North Haven arises out of the assertion and assumption of authority by the Defendants, Califano, Bynoe and Montalvo to regulate employment practices of Brunswick [*sic*] pursuant to Sections 901 and 902.

28. The promulgation of subpart E of HEW Regulations was in excess of the statutory authority conferred by Congress in Section 902 because Section 901 protects from discrimination the students who are the participants in and the beneficiaries of federally assisted education programs and activities only.

29. The promulgation of subpart E of the HEW Regulations was inconsistent with and in violation of the provisions of the 1972 amendments to Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, which grants jurisdiction and authority to the Equal Employment Opportunity Commission to regulate unlawful employment practices and in particular alleged sex discrimination in employment practices.

30. The promulgation of subpart E of the HEW Regulations was inconsistent with and in violation of the 1972 amendment to the Fair Labor Standards Act, 29 U.S.C. § 206(d), and the Equal Pay Act, which grant jurisdiction and authority to the Department of Labor to regulate certain unlawful employment practices and in particular alleged sex discrimination in pay for equal employment.

31. The application of subpart E of the HEW Regulations to regulate the general employment practices of North Haven which are applicable to employees engaged in a broad range of educational programs and activities, some of which are not federally assisted, is in irreconcilable conflict with the express limitation of authority contained in Section 901, *et seq.*, i.e. to regulate educational programs or activities receiving federal financial assistance.

32. The threatened termination of federal financial assistance to the Board for refusal to submit information on its employment practices is in excess of the authority conferred by Congress under Section 901, *et seq.* since such finding does not concern students who have been the beneficiaries under the federally funded programs.

33. Plaintiffs have no adequate remedy at law and this controversy is ripe for judicial resolutions. [*sic*].

WHEREFORE, Plaintiff demands the following relief:

1. Declaratory judgment that subpart E of Part 86, Title 45 C.F.R. and all actions and proceedings taken by Defendants with respect to this Plaintiff pursuant there [*sic*] are invalid, void and of no effect whatsoever.

2. Declaratory judgment that Defendants, Califano, Bynoe and Montalvo may not terminate or refuse to grant or continue federal financial assistance to Plaintiffs pursuant to the provisions of Section 902, 20 U.S.C. § 1681, unless said Defendants duly find that Plaintiffs federally funded programs are in noncompliance with Section 901 and valid regulations enacted pursuant thereto.

3. Preliminary and permanent injunction ordering Defendants to cease and desist from any attempt to terminate federal financial assistance to Plaintiff for alleged noncompliance with subpart E, Title 45 C.F.R. Part 86.

4. Such other and further equitable relief as justice may require.

5. Award of its costs and attorney fees.

PLAINTIFFS

By: /s/ Siegel, O'Connor & Kainen, P.C.
Its Attorneys
Office and Post Office Address
60 Washington Street
Hartford, Connecticut 06106

By: /s/ Susan K. Krell
SUSAN K. KRELL

—and—

By: /s/ Donald W. Strickland
DONALD W. STRICKLAND

Hartford, Connecticut

May 26, 1978

EXHIBIT "B"

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Region I
140 Federal Street
Boston, Massachusetts 02110

Office For Civil Rights

January 10, 1978

Mr. Delio J. Rotondo
Superintendent
North Haven Public Schools
1151 Hartford Turnpike
North Haven, Connecticut 06473

Complaint No. 01-77-0125

Dear Mr. Rotondo:

We are in receipt of a complaint alleging that the North Haven Board of Education has acted or is acting in violation of Title IX of the Education Amendments of 1972 which prohibits discrimination on the basis of sex by recipients of Federal financial assistance. The specific allegation deals with hiring and other terms and conditions of employment including child care leave.

Based on a court order issued by the U.S. District Court for the District of Columbia in the suit of *Adams* v. *Califano* (Civil Action No. 3095-70), procedures and timetables have been set for the handling of complaints by the Office of Civil Rights.

The investigation of this complaint must be completed within the first one hundred and five (105) days after receipt. If it is determined that a statutory violation has occurred, the respondent will be requested to take

corrective action. In the event that we are unable to agree as to the implementation of an appropriate remedy within an additional ninety (90) day period, formal enforcement action shall commence no later than thirty (30) days following the ninety (90) day period or the matter may be referred to the Department of Justice.

Please be assured that this office is committed to resolving this matter in an efficient and timely manner. Toward this end, we are requesting that you send us the information itemized on the attached sheet within 15 days of the date of this matter. We have also enclosed for your information a copy of our notification form concerning our authority to solicit information from your agency for evaluation of compliance with the laws administered by this office, the uses of such information and sanctions which may be imposed if the information is not provided.

If you have any questions, please do not hesitate to contact Caroline Chang at (617) 223-6397.

Sincerely yours,

/s/ John G. Bynoe
JOHN G. BYNOE
Director
Office of Civil Rights
Region I

Enclosure

INFORMATION REQUESTED

1. Description of hiring process
   a. Persons involved in decision-making (by position); who makes what decisions?
   b. Copy of established procedures; if not in writing, explain how the process is communicated to the decision-makers and to persons affected by it.
2. Description of criteria applied in hiring process
   a. Nature, purpose and relative weight of each criterion.
   b. A copy of written criteria; if not in writing, how are criteria communicated to decision-makers and persons affected.
3. Copy of employment application form for teaching positions.
4. Copy of collective bargain contract(s) covering teachers for period from January, 1976 to present.
5. Copy of all policies relating to granting of leaves of absence.
6. Copy of all policies relating to seniority and tenure.

OFFICE FOR CIVIL RIGHTS (OCR) DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE (HEW)

Recipient's Notification Form Concerning the Privacy Act of 1974

The Privacy Act of 1974, Public Law 93-579, effective on September 28, 1975, protects against the unauthorized use of personally identifiable data by any agency of the Federal Government. The following concerns the information to be collected from your district in evaluating the compliance with equal opportunity laws administered by OCR.

1. AUTHORITY FOR SOLICITATION OF INFORMATION: Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color or national origin in any program or activity receiving Federal Financial Assistance. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex under federally-assisted education programs or activities. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap in any program or activity receiving Federal Financial assistance. Under 45. C.F.R. §§ 80.6(c) and 80.7(c), OCR has responsibility for ascertaining compliance by those local educational agencies subject to these statutes.

2. PRINCIPAL PURPOSE FOR WHICH INFORMATION IS TO BE USED: Pursuant to a complaint, the Office For Civil Rights is conducting an investigation of your district to determine compliance with some or all of the three legal authorities named in paragraph (1), above. The information collected will be analyzed by the Office For Civil Rights in order to determine compliance.

3. ROUTINE USES OF THE INFORMATION: In addition to ascertaining compliance with the three legal authorities mentioned above, this information is used to advise your institution of its compliance status. The other routine use of this data would be to secure approval for and to bring administrative or judicial enforcement proceedings where compliance cannot be secured by voluntary means

Recipients Notification Form Concerning the Privacy Act of 1974

4. EFFECTS OF NOT PROVIDING THE REQUESTED INFORMATION: Sanctions may be imposed on your district if it does not provide information requested by this Office. Failure to supply information pertinent to the investigation of the complaint may result in action to enforce the assurance froms and/or Federal contract provisions that your district is obligated to comply with pursuant to the appropriate authority cited above.

Absent the consent of the complainant, OCR will not disclose to anyone any personally identifiable data about the complainant, except to the extent that such disclosure involves a routine use described above, and except as required by law. Under the Freedom of Information Act and the HEW regulation implementing that Act (45 C.F.R. Part 5), no such information is required to be disclosed to the public until resolution of compliance status; and during and after the conclusion of the investigation § 5.71 of the HEW regulation precludes disclosure to the public of information (1) of a personal and private nature, or (2) having a commercial, financial, or professional value, which is, in fact, confidential, and in which the person providing the information has a proprietary interest.

EXHIBIT "C"

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Region I
140 Federal Street
Boston, Massachusetts 02110

Office For Civil Rights
(617) 223-6397

April 19, 1978

Ms. Susan K. Krell
Siegel, O'Connor & Kainen, P.C.
60 Washington Street
Hartford, Connecticut 06106

Re: Complaint No. 01-77-0125

Dear Ms. Krell:

This is in response to your letter dated April 12, 1978. As we indicated to you in our letter dated March 17, 1978, we disagree with your conclusion that the decisions made by the United States District Courts from Michigan, Kansas, and the State of Washington preclude investigations by our office of possible noncompliance with Title IX by the North Haven Connecticut Board of Education. Your request that we dismiss Ms. Dove's complaint for lack of jurisdiction cannot be granted.

In our letter of April 5, 1978 we requested that you advise the North Haven Connecticut Board of Education to submit the information requested on January 10, 1978. Your failure to do so leaves us no other alterna-

tive but to refer this case to the Office of the Regional Attorney for possible administrative enforcement.

Sincerely yours,

/s/ John G. Bynoe
JOHN G. BYNOE
Director
Office for Civil Rights
Region I

cc: Delio Rotundo
Superintendent of Schools

EXHIBIT "D"

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE
Region I
140 Federal Street
Boston, Massachusetts 02110

Office For Civil Rights
(617) 223-6397

April 27, 1978

Ms. Susan K. Krell
Siegel, O'Connor & Kainen, P.C.
60 Washington Street
Hartford, Connecticut 06106

Complaint No. 01-77-0125

Dear Ms. Krell:

This is in response to your letter of April 24, 1978. In Mr. Bynoe's letter to you dated April 5, we submitted the information which you are requesting now.

For your information we are enclosing a copy of the regulations, and we have underlined the applicable sections. These procedures may be found on page 24144—Subpart F—Section 86.71 of the Federal Register (Nondiscrimination on the Basis of Sex) and on pages 6-11 of 45 CFR—Section 80.6 to 80.11 (Title VI Regulation).

I hope this information satisfies your inquiry.

I also want to inform you that this complaint file was referred to the Regional Attorney for possible enforcement proceedings on April 24, 1978. You may still avoid enforcement action by advising your client to submit the information as originally requested.

Our office wishes to work with you and your client in a harmonious way. If you have further questions in this matter, do not hesitate to call me.

Sincerely yours,

/s/ Maria C. Montalvo
MARIA C. MONTALVO
Chief
Elementary and Secondary
Education Branch
Office for Civil Rights
Region I

Enclosures

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. N78-165

NORTH HAVEN BOARD OF EDUCATION, PLAINTIFF

v.

JOSEPH A. CALIFANO, JR., ET AL., DEFENDANTS

ANSWERS TO DEFENDANT'S REQUEST FOR ADMISSIONS

Plaintiff, North Haven Board of Education, by its attorney Susan K. Krell, answers the request for admissions served upon it by Defendant on June 22, 1978 as follows:

Request No. 1: The North Haven School District has received, either directly or through the State of Connecticut, federal financial assistance administered by HEW which it has used since July 1975, in whole or in part, to pay salaries of its employees.

Answer: The Plaintiff admits the matters set forth in this request.

Request No. 2: The North Haven School District has received, either directly or through the State of Connecticut, federal financial assistance administered by HEW which it has used since July 1975, in whole or in part, to pay salaries of its teachers.

Answer: The Plaintiff admits the matters set forth in this request.

Request No. 3: The North Haven School District expects to receive either directly or through the State of

Connecticut, federal financial assistance administered by HEW which it will use, in whole or in part, to pay salaries of its employees.

Answer: The Plaintiff admits the matters set forth in this request.

Request No. 4: The North Haven School District expects to receive either directly or through the State of Connecticut, federal financial assistance administered by HEW which it will use, in whole or in part, to pay salaries of its teachers.

Answer: The Plaintiff admits the matters set forth in this request.

Request No. 5: The North Haven School District has received, either directly or through the State of Connecticut, federal financial assistance administered by HEW which it has used since July 1975, in whole or in part, to pay either directly or indirectly for training of its employees.

Answer: The Plaintiff denies the matters set forth in this request.

Request No. 6: The North Haven School District has received, either directly or through the State of Connecticut, federal financial assistance administered by HEW which it has used since July 1975, in whole or in part, to pay either directly or indirectly for training of its teachers.

Answer: The Plaintiff denies the matters set forth in this request.

Request No. 7: The North Haven School District expects to receive, either directly or through the State of Connecticut, federal financial assistance administered by HEW which it will use, in whole or in part, to pay either directly or indirectly for training of its employees.

Answer: The Plaintiff admits the matters set forth in this request.

Request No. 8: The North Haven School District expects to receive, either directly or through the State of Connecticut, federal financial assistance administered by HEW which it will use, in whole or in part, to pay either directly or indirectly for training of its teachers.

Answer: The Plaintiff admits the matters set forth in this request.

Request No. 9: The North Haven School District has received, either directly or through the State of Connecticut, federal financial assistance administered by HEW which it has used since July 1975, in whole or in part, to pay either directly or indirectly for education of its employees.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Civil No. N-78-165

NORTH HAVEN BOARD OF EDUCATION, PLAINTIFF

v.

JOSEPH A. CALIFANO, JR., ET AL., DEFENDANTS

DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. Plaintiff North Haven Board of Education is charged with the responsibility of operating all of the North Haven public schools. Complaint ¶ 2.

2. The North Haven School District has received significant amounts of federal financial assistance which it has used to pay employees' salaries, including teachers' salaries. Answers to Defendants' Request for Admissions, Nos. 1-2. The approximate total dollar amounts of federal assistance received and a breakdown of how such funds were expended are set forth in Plaintiff's Response to Defendants' Interrogatories. An analysis of the figures provided therein indicates that during the 1977-78 school year, the school district received $111,564.00 of federal funds and used approximately 66.90% ($74,639.22) of this money to pay employees' salaries. In the 1976-77 academic year, approximately 46.79% ($40,664.00 out of $86,905.00) and in the 1975-76 year, approximately 53.95% ($51,393.42 out of $95,269.00) of the federal financial assistance received was used to pay salaries of North Haven's employees.*

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* The total amount of federal funding received per school year is set forth in Exhibit A to Plaintiff's Response to Defendants' Interrogatories. The amounts allocated to "personnel" and/or "salaries" is set forth in Exhibits C, E, G, H, J, K, L, M, N, Q and R to *Id.*

3. North Haven expects to receive approximately $138,683.00 of federal financial assistance for the 1978-79 year, Exhibit A to Plaintiff's Response to Defendants' Interrogatories, and intends to use * 53.19% ($73,-768.00) of this amount to pay employees' salaries. Percentage based on figures provided in Exhibits T and V to *Id.* In addition, North Haven intends to use some of the federal funds to pay either directly or indirectly for training of its employees, including teachers. Answers to Defendants' Request for Admissions, Nos. 7-8.

4. As a recipient of federal monies, the North Haven School District is subject to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, (hereinafter "Title IX"), which prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance.

5. Pursuant to rulemaking authority to implement Title IX's substantive prohibitions, 20 U.S.C. § 1681, the United States Department of Health, Education and Welfare issued regulations effective July 21, 1975, published at 45 C.F.R. Part 86 (hereinafter "HEW Regulations"). The Regulations have the force of law; they are in final approved form and are currently in effect. Complaint, ¶ 11.

6. Subpart E of the HEW Regulations prohibits discrimination on the basis of sex against employees of recipient education institutions. 45 C.F.R. Part 86, Subpart E.

7. Under Section 902 of Title IX, 20 U.S.C. § 1682, HEW is empowered to investigate alleged violations of Title IX and to initiate enforcement proceedings if voluntary compliance cannot be secured. Complaint, ¶ 13.

8. By letter dated January 10, 1978, HEW notified the Superintendent of the North Haven Public Schools that a complaint had been received (Exhibit A to Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss or, in the Alternative, for Sum-

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* Answers to Defendants' Request for Admissions, Nos. 3-4.

mary Judgment) alleging that North Haven had violated Title IX by discriminating on the basis of sex in hiring and other terms and conditions of employment including child care leave. Complaint, ¶ 14. The letter also advised North Haven that an investigation of the alleged violation would be conducted within specified timeframes. Accompanying the letter was a questionnaire requesting information about the school district's policies on hiring, leaves of absence, seniority and tenure. (The letter and questionnaire are Exhibit B to Plaintiff's Complaint).

9. North Haven has to date refused to comply with HEW's requests for information respecting the alleged violation, set forth in paragraph 7 above.

Respectfully submitted,

/s/ Barbara Allen Babcock
BARBARA ALLEN BABCOCK
Assistant Attorney General

/s/ Richard Blumenthal
RICHARD BLUMENTHAL
United States Attorney

/s/ Barbara B. O'Malley
BARBARA B. O'MALLEY

/s/ Judy Sello
JUDY SELLO

Attorneys, Department of Justice
Washington, D.C. 20530
Tel: (202) 739-3358

Attorneys for Defendants

Of Counsel:

Joseph S. Ackerstein
Assistant Regional Attorney
United States Department of Health, Education and Welfare
John F. Kennedy Federal Building
Boston, Massachusetts 02203

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. N78-165

NORTH HAVEN BOARD OF EDUCATION, PLAINTIFF

v.

JOSEPH A. CALIFANO, JR., ET AL., DEFENDANTS

PLAINTIFF'S STATEMENT OF MATERIAL FACTS

Plaintiff, by its counsel, submits this statement of material facts, pursuant to Rule 10(a)(3) of the Local Rules of Court. It is based upon the Complaint.

1. Plaintiff, North Haven Board of Education is an elected local Board of Education in the State of Connecticut duly constituted under the laws of the State of Connecticut which has received federal financial assistance from the Department of Health, Education and Welfare (hereinafter, "HEW") through the State of Connecticut for school years 1975-76, 1976-77, 1977-78 in amounts of approximately $95,269, $86,905, $111,212, respectively. These amounts include $24,307.50 for special education; $65,474 for children of low-income families; $14,188 for the Vocational Education Act.

2. In 1972, Congress passed the Education Amendments Act, 20 U.S.C. §§ 1681, *et seq.*

3. In 1975, HEW promulgated regulations to effectuate 20 U.S.C. §§ 1681, *et seq.* which regulations, *inter alia*, prohibit discrimination on the basis of sex in employment by any recipient of federal financial assistance, 45 C.F.R. Part 86, sub-part E.

4. By letter of January 10, 1978, the Plaintiff was notified by Defendant, John Bynoe, Director, Office for

Civil Rights, Region I, HEW, that a complaint had been filed against it alleging sex discrimination in hiring and other terms and conditions of employment, including child care leave in violation of 45 C.F.R. § 86.57(a)(12).

5. After receipt of a copy of the complaint, Plaintiff on February 7, 1978 requested HEW to dismiss the charge because HEW had no jurisdiction to regulate employment discrimination and those portions of its regulations purportedly promulgated to regulate employment discrimination were invalid, void and of no effect whatsoever. Plaintiff advised HEW that three U.S. District Courts had ruled to this effect in directly analogous cases.

6. The assistant regional attorney for HEW refused to dismiss the complaint and advised the Office of Civil Rights to pursue an investigation of compliance.

7. On April 27, 1978, Plaintiff was informed by the Defendants that the complaint was referred to the Regional Attorney for possible enforcement proceedings. The termination of federal financial assistance, as threatened would result in the elimination of, or at least substantial curtailment of, the programs for which federal financial assistance is used.

By: Siegel, O'Connor & Kainen, P.C.
Its Attorneys
Post Office and Office Address
60 Washington Street
Hartford, Connecticut 06016

By: /s/ Susan K. Krell
SUSAN K. KRELL

—and—

By: /s/ Donald W. Strickland
DONALD W. STRICKLAND

Hartford, Connecticut

August —, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. B78-401

THE TRUMBULL BOARD OF EDUCATION, PLAINTIFF

vs.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, an agency of the United States of America and LINDA POTZ, DEFENDANTS

COMPLAINT

Plaintiff, The Trumbull Board of Education, by its attorneys, Cummings & Lockwood, complains against the above-named Defendants as follows:

1. Plaintiff is a local Board of Education duly organized under the laws of the State of Connecticut and operates the public school system in Trumbull, Connecticut.

2. Defendant United States Department of Health, Education and Welfare (hereinafter referred to as "HEW") is a duly organized and existing Executive Department of the United States.

3. This action arises under Article I and the Fifth and Fourteenth Amendments of the United States Constitution, and the Education Amendments of 1972, P.L. 92-318, Title IX, § 901, *et seq.*, 20 U.S.C. § 1681 *et seq.*, as amended, 5 U.S.C. § 701 *et seq.*, as amended, and 42 U.S.C. § 1988, as hereinafter more fully appears.

4. This is an action for an injunction and a declaratory judgment pursuant to 28 U.S.C. § 2201, as amended. The amount in controversy herein exceeds the sum of ten thousand dollars ($10,000), exclusive of interest and

costs. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1361.

5. 20 U.S.C. 1681 [hereinafter Title IX, § 901] provides in relevant part:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, ..."

6. 20 U.S.C. § 1682 [hereinafter Title IX, § 902] provides in relevant part:

> "Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken . . . ."

7. Defendant HEW is a Federal Department within the meaning of said § 902 and has issued Regulations entitled "Final Title IX Regulation Implementing Educational Amendments Act of 1971 [*sic*] Prohibiting Sex Discrimination in Education". These Regulations appear at 45 C.F.R. Part 86, and are effective July 21, 1975.

8. Subpart E of said Regulations purports to prohibit discrimination on the basis of sex in employment and provides in relevant part:

> (a) General. (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor whether full-time or part-time, under any

education program or activity operated by a recipient which receives benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(b) Application. The provisions of this subpart apply to:

• • • •

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, and rehiring;

• • • •

(4) Job assignments, classifications and structure, position descriptions, lines of progression, and seniority lists;

• • • •

(9) Employer sponsored activities, including social or recreational programs; and

(10 Any other term, condition or privilege of employment."

9. Pursuant to complaint No. 01-77-0100 filed on or about October 5, 1977, with the Office for Civil Rights, Department of Health, Education and Welfare, Region I, Boston, Massachusetts, by Defendant Linda L. Potz, employed by Plaintiff as a High School Counselor, alleging sex discrimination in job assignments, working conditions, and non-renewal of contract, Defendant HEW purported to investigate whether Plaintiff was in violation of Title IX and Defendant HEW's Regulations implementing Title IX.

10. Despite Plaintiff's assertion that its actions concerning Defendant Potz were legal, Defendant HEW by letter dated September 20, 1978, a copy of which is attached hereto as Exhibit "A", found that Plaintiff had failed to comply with Section 86.51 of the Title IX Regulations, finding violations in job assignments, working conditions and non-renewal of contract, and finding that Plaintiff was therefore not in compliance with Title IX, § 901.

11. Having so found, as set forth more fully in Exhibit "A", Defendant HEW has demanded that Plaintiff submit a remedial plan for corrective action, which plan must include an offer to reinstate Defendant Potz to her former position at the proper salary level, and reimbursement of Defendant Potz for any loss in salary and other benefits since the date of her termination to the date of her reinstatement, and removal of all and any adverse materials from the personnel file of Defendant Potz relating to job assignments and working conditions found to violate Title IX of the Education Amendments of 1972.

12. Having so found, as set forth more fully in Exhibit "A", Defendant HEW has further demanded that Plaintiff give assurances to Defendant HEW on or before October 22, 1978 that Plaintiff will comply with said demands of Defendant HEW, failing which Defendant HEW has threatened Plaintiff with the institution of administrative enforcement proceedings. The commencement of said enforcement proceedings may lead to immediate suspension and ultimate termination of the Federal financial assistance presently extended to Plaintiff, pursuant to § 80.8 of the Regulations.

13. The total amounts of said Federal financial assistance to Plaintiff for the school years 1976-1977, 1977-1978 and 1978-1979 were substantial.

14. For the 1978-79 school year, the Federally-assisted programs include: Title I (pre-school preparatory and elementary school remedial reading programs); Title IV, (including project Achieve); and Title VIb,

(program for handicapped pupils). Said programs are of a continuing nature and, accordingly, are anticipated to extend into the 1979-80 school year and beyond.

15. The termination of said Federal financial assistance, as threatened, would result in the elimination or, at least, substantial curtailment of the above continuing programs which would inure to the detriment of the Plaintiff and cause irreparable harm to it and the citizens that it by law represents.

16. The foregoing threatened loss and harm to the Plaintiff and the Trumbull Public Schools arises out of the Defendant HEW's assertion and assumption of authority to regulate employment practices of the Plaintiff, pursuant to the Regulations allegedly based upon Title IX, §§ 901, 902.

17. Defendant HEW's adoption and issuance of Subpart E of said Regulations, and § 86.51 in particular, is in excess of the authority conferred by Congress upon Defendant HEW in Title IX, §§ 901, 902, for the reason that Title IX regulates and prohibits discrimination in Federally-assisted programs and activities solely in favor of the students and other persons who are the object and beneficiaries of said programs rather than to employees in general, such as Defendant Potz.

18. Defendant HEW's adoption and issuance of Subpart E of said Regulations, and § 86.51 in particular, confuses its jurisdiction with the jurisdiction conferred under Title VII, 42 U.S.C. § 2000e, granted to the Equal Employment Opportunity Commission to regulate unlawful employment practices and in particular alleged sex discrimination in employment practices.

19. Defendant HEW's adoption and issuance of Subpart E of said Regulations, and § 86.51 in particular, violates Article I of the United States Constitution, in that it is an unconstitutional infringement on the powers of Congress as contained therein.

20. Defendant HEW's adoption and issuance of Subpart E of said Regulations, and § 86.51 in particular,

violates the rights of Plaintiff secured by the Fifth and Fourteenth Amendments to the United States Constitution.

21. Defendant HEW's application of Subpart E of said Regulations, and § 86.51 in particular, to regulate the general employment practices of the Plaintiff which are applicable to employees engaged in a broad range of educational programs and activities, which are not Federally assisted, is in irreconcilable conflict with the express limitation of authority contained in Title IX, §§ 901, 902, *i.e.*, to regulate only those educational programs or activities receiving Federal financial assistance.

22. Defendant HEW's threatened termination of Federal financial assistance to Plaintiff, as a result of its findings that Plaintiff violated § 86.51 of said Regulations, is contrary to the Defendant HEW's Regulations, including, in particular, § 86.51(a) of said Regulations and is in excess of the authority conferred upon that agency by Congress, as such finding does not concern persons who have been the beneficiaries of or been subjected to discrimination under any educational program or activity receiving Federal financial assistance, as provided under Title IX, § 901.

WHEREFORE, Plaintiff demands the following relief:

a. A Declaratory Judgment that Subpart E of said Regulations and all actions and proceedings taken by Defendant HEW with respect to this Plaintiff pursuant thereto are invalid and void and of no effect whatsoever.

b. A Declaratory Judgment that Defendant HEW may not terminate Federal financial assistance to Plaintiff unless Defendant HEW finds, in accordance with Title IX, that Plaintiff's Federally-funded programs are in non-compliance with Title IX and valid regulations enacted pursuant thereto.

c. An Injunction enjoining Defendant HEW from requiring Plaintiff to comply with or otherwise giv-

ing effect to its demand letter dated September 20, 1978, and from engaging in any investigation of Plaintiff The Trumbull Board of Education pursuant to any complaint filed with Defendant HEW alleging discrimination against any employee of Plaintiff pursuant to 45 CFR § 86 Subpart E, and from making or attempting to make any finding that Plaintiff is in non-compliance with said Regulations, and from terminating or refusing to grant or suspending, or attempting to terminate, refuse to grant or suspend Federal financial assistance to plaintiff for any alleged non-compliance with said Regulations, and from failing to duly and normally process Plaintiff's applications for Federal financial assistance and from otherwise penalizing Plaintiff in any way for alleged non-compliance with Subpart E of said Regulations.

d. Costs and attorneys fees.

e. Such other and further legal and equitable relief as justice may require.

PLAINTIFF
THE TRUMBULL BOARD
OF EDUCATION

By /s/ Paul E. Knag
PAUL E. KNAG
Cummings & Lockwood
One Atlantic Street
Stamford, Connecticut 06904
(203) 327-1700

Dated: October 18, 1978

EXHIBIT A

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Region I
140 Federal Street
Boston, Massachusetts 02110

Office of Civil Rights
(617) 223-6397

September 20, 1978

Dr. Duncan Yetman
Superintendent
Trumbull Public Schools
6264 Main Street
Trumbull, Connecticut 06611

RE: Complaint No. 01-77-0100

Dear Dr. Yetman:

We have completed our investigation of the above referenced complaint filed by Linda Potz against your school district. The complaint alleged discrimination on the basis of sex in job assignments, working conditions, and non-renewal of contract. This has been a very lengthy investigation and we want to thank you for your patience and cooperation during this time period.

Based on the data gathered during our investigation, we have concluded that your district failed to comply with Section 86.51 of the Title IX Regulation which prohibits discrimination on the basis of sex in employment. Enclosed for your information is a complete summary of our findings. Specifically, we found violations in:

—job assignments
—working conditions
—non-renewal of contract

Compliance with the Title IX Regulation is sought by informal means whenever possible. We therefore solicit

your cooperation in taking remedial action responsive to the findings in this letter. To this end, within thirty days of receipt of this letter, the Trumbull Board of Education should submit to this office a plan for corrective action and a timetable for the implementation of the plan. Such plan should include:

1. An offer to reinstate Ms. Potz to her former position at the proper salary level.
2. Reimbursement of Ms. Potz for any loss in salary and other benefits since the date of her termination to the date of her reinstatement.
3. Removal of all and any adverse material from the personnel file of the complainant relating to job assignments and working conditions found herein to violate Title IX of the Education Amendments of 1972. (OCR should be furnished with a copy of such file for its review).

I wish to assure you of our full cooperation in assisting your school district in its resolution of this complaint. In the event that this matter cannot be resolved by informal means within ninety days from the date of this letter, formal enforcement action may be initiated by commencement of administrative proceedings or by other means authorized by law.

Under the Freedom of Information Act it may be necessary to release this document and related correspondence in response to inquiry.

If you have any questions or need technical assistance, please call Maria C. Montalvo, Director, Elementary and Secondary Education Division, at (617) 223-6397.

Sincerely yours,

/s/ John G. Bynoe
JOHN G. BYNOE
Director
Office of Civil Rights
Region I

Enclosure

SUMMARY

Complaint No. 01-77-0100

I. *Applicable Regulations*

The discriminatory acts cited in our letter violated Section 86.51 (45 CFR Part 86) of the Regulation implementing Title IX of the Education Amendments of 1972. The relevant portions of Section 86.51 are quoted below:

> (a) General. (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefore whether full-time or part-time, under any education program or activity operated by a recipient which receives of benefits from Federal financial assistance.
>
> (2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.
>
> • • • •
>
> (b) Application. The provisions of this subpart apply to:
>
> • • • •
>
> (2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, and rehiring;
>
> • • • •

(4) Job assignments, classifications and structure, position descriptions, lines of progression, and seniority lists;

• • • •

(9) Employer sponsored activities; including social or recreational programs; and

(10) Any other term, condition or privilege of employment.

II. *Allegations*

The complainant alleged that from August, 1975 to July, 1977 she received different treatment in comparison to the two male counselors with whom she worked, which eventually led to the termination of her employment with the school system. She alleged that with the direction by and approval of Principal, Robert McCarthy, Madison Jr. High School, she was:

1. Required to run errands outside the building during the day, errands not related to counseling functions which necessitated cancellation of appointments with students.
2. Required to type—entailing days which should have been spent counseling.
3. Required to substitute in a business education classroom as a teacher over a period of seven weeks from one to two periods each week to save the cost of a substitute.
4. Arbitrarily moved to a barely heated "cubby hole" away from the suite of guidance officers near the gymnasium without any forewarning.
5. Subjected to supervisory comments by male counselors not in a position or with supervisory authority over her.

6. Given more responsibilities than her male counterparts i.e., training a guidance intern, meeting with private school representatives who visited the school.

7. Told to change a report because it showed she had seen more students than her male counterparts.

Ms. Potz also stated that in July of 1977 after a hearing at which numerous parents and teachers testified in her behalf, she was terminated from her employment.

In a later charge, Ms Potz alleged that she was prevented from attending teachers' meetings at Madison Junior High School.

III. *Findings*

Our investigation disclosed that the complainant was required to perform certain tasks which were not part of her duties as a guidance counselor and not required to be performed by the other male counselors with whom she worked. These tasks included running errands, typing, and substituting as a teacher in a business education classroom for a lengthy period of time. Given the circumstances under which such tasks were performed by the complainant, we cannot accept the district's justification that she "volunteered" for extra duties. The district's assertion that the male guidance counselors were assigned substitute teaching duties as often as the complainant were not substantiated.

Our investigation disclosed that the district discriminated against the complainant on the basis of sex by moving her office at the Madison Junior High School away from the offices of her male counterparts. The complainant was moved to a smaller, less comfortable office near the gymnasium

which suffered from lack of heat. The change had a demeaning effect on the complainant in the eyes of her co-workers and counselees. In this context, the administrative justification for moving the complainant which has been offered by the district appears inadequate. Moving the complainant because she spent only two days a week at Madison and because it was "unfair" for a social worker to remain in the less comfortable office was unjustified because the record indicates the district failed to explore other, less drastic alternatives.

Our investigation disclosed that the district violated Title IX by the manner in which it challenged a report by the complainant showing the number of counselees she had seen during a particular time period.

The information submitted to us indicates that the complainant was asked to change a report showing that she had seen 150 students in a given week because this number was so much higher than the number seen by her male counterparts and not because the number was incorrect.

The charge "subjected to supervisory comments by male counselors" was not investigated as we felt this to be a moot point. We also did not address ourselves to the issue of "given more responsibilities than male counterparts" in our findings, although the district's response was not discounted.

The allegation by the complainant that she was not allowed to attend teachers' meetings at Madison was not upheld. We felt that the district in requesting the complainant to attend meetings at Hillcrest instead, was reasonable since she was at Hillcrest when their teacher meetings convened.

Our investigation disclosed that the complainant's sex was the motivating factor in the district's de-

cision not to renew her contract. The record shows that the district hired the complainant in August, 1975 as a guidance counselor at Madison Junior High. She was the only female counselor. Ms. Potz alleges that Madison Principal McCarthy told her he would have preferred to hire a male counselor. His subsequent actions lend credence to this allegation of sexual animus. We note that at the time of events of this case, substantially all administrative leadership positions in the Trumbull School System were held by males.

During the second year of her employment, it was decided that she would split her time between two junior high schools in Trumbull, Madison and Hillcrest. The evaluation of the complainant's performance was shared by the two principals of Madison and Hillcrest, Mr. McCarthy and Mr. DiDonato, respectively.

Mr. McCarthy on March 25, 1976 recommended the complainant for renewal of her contract and a salary increment based on her performance evaluation from September 1, 1975 to February 3, 1976. Her contract was renewed on June 1, 1976 and immediately on June 17, 1976 an unsigned performance evaluation was handed to the complainant by Mr. McCarthy.

We cannot understand why if her performance was so detrimental to the school system he did not voice his concerns prior to March 1, 1976 and the signing of her contract. In addition, the budget difficulties the district was facing could have presented a good opportunity to get rid of undesirable or nonperforming teachers.

On the other hand, on January 1, 1977, Mr. DiDonato gave the complainant a favorable job performance evaluation and Mr. McCarthy refused to cosign it.

It appears that the Board based its decision not to renew the complainant's contract on allegations made against her by Mr. McCarthy without considering the opinion of the other principal sharing supervisory responsibilities.

Upon receiving her notice of nonrenewal of contract in February, 1977, Ms. Potz in a letter to the district dated February 26, 1977 requested a public hearing before the Board of Education. At this point in time, after several requests, Ms. Potz still did not have a statement of reason for the nonrenewal of her contract. Connecticut General Statutes require that upon request a teacher be provided a statement of reasons within five (5) days of notice of nonrenewal. It was almost two months before the complainant received a list of specifics for nonrenewal.

On the 29th of April the complainant's attorney was sent a list of eight specific reasons citing the Board's dissatisfaction.

Private hearings were held on June 9, 15, 29, and July 6, 1977. (The request for a public hearing was denied.) An attempt was made to get copies of the transcripts of the entire hearings from the district but due to their length, the district could not oblige our request. However, we did obtain copies of part of the transcripts from the complainant.

Based on our review of these transcripts, we found that teachers, parents, a doctor, and some students testified on behalf of Ms. Potz.

In Charge 1 (meeting with male school personnel) all of the personnel named either testified in person or sent letters denying the fact that they spent an inordinate amount of time with the complainant.

In Charge 2 (numerous personal telephone calls) it was brought out in the hearings that other personnel received and made personal telephone calls.

In Charge 3 (arranging an appointment for a minor female student to receive birth control pills) an affidavit from the student involved denying the charge was introduced.

In Charge 4 (failure to refer a potentially emotionally disturbed student to Pupil Services) the father of the student testified that the complainant handled the matter with his daughter in an "exemplary manner."

In Charge 5 (failure to refer to the school nurse or to any member of the administration a child who had slit her wrists) both the student involved in the charge and her mother voluntarily appeared on behalf of the complainant. The student admitted that the complainant was not around or was even aware of the incident at the time it occurred.

In Charge 6 (revealing to teachers at a PPT that a student had been arrested for suspected larceny and had been involved in drug abuse) the Board deleted the portion of the charge that said "had been arrested for suspected larceny" and did not include it in their deliberations. However, the charge of impropriety before the PPT was never clearly defined in the transcripts of the hearings that we had. General Statute 10-154(a) states that a teacher doesn't have to divulge any outside information with regard to drug abuse by a student at a PPT, but it does not say that a teacher *cannot* do so.

In Charge 7 (interfering with a school nurse who was attempting to treat a student overdosed on drugs or alcohol) a doctor testified that the school nurse had committed grave errors in the handling of the sick child.

Charge 8 (refusal to maintain student files) was not addressed in the copies of the transcripts we possessed but there were letters from co-workers attesting to the fact that Ms. Potz kept very good files.

The Board apparently did not give any weight to public support by parents, educators, students, and former employers. Letters attesting to the work performance and good character of the complainant were sent to this office, the school district, and the complainant.

It is our finding in the light of the evidence that the Board's announced reasons for non-renewal of Ms. Potz's contract were pretextual. In the absence of any other satisfactory explanation for the non-renewal of her contract, we conclude that sex bias was the responsible factor. Nothing presented to us suggests that the Board of Education would have failed to renew the contract of a male guidance counselor with a record comparable to that of Ms. Potz.

The evidence submitted to us points to the conclusion that the complainant was performing her duties and responsibilities adequately.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. B-78-401

THE TRUMBULL BOARD OF EDUCATION, PLAINTIFF

vs.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE and LINDA POTZ, DEFENDANTS

May 4, 1979

PLAINTIFF'S OBJECTIONS TO DEFENDANT POTZ'S FIRST SET OF INTERROGATORIES TO PLAINTIFF

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, plaintiff objects to defendant Potz's First Set of Interrogatories to Plaintiff as follows:

1. As to each of the following school years, state whether federal financial assistance was or is expected to be received by the Trumbull School District, either directly or through the State of Connecticut:

a. 1975-1976.

b. 1976-1977.

c. 1977-1978.

d. 1978-1979.

Objection to Interrogatory 1:

Plaintiff objects to defendant Potz's Interrogatory 1 because the United States District Court, Burns, J., has now ruled in the matter entitled *North Haven Board of Education* vs. *Califano, et al.* (Civil No. N-78-165, April 26, 1979), which case presents the identical issue of law which is dispositive in this case, and that on the basis thereof the plaintiff has moved for summary judgment, which motion would be dispositive of all issues in this case and renders discovery irrelevant.

2. If the answer to Interrogatory 1 is in the affirmative, state, as to each school year designated, the following:

a. Each and every type of federal financial assistance received;

b. The federal agency administering the assistance (whether the Department of Health, Education and Welfare (HEW) or another agency);

c. The statutory authority for the funds received or expected to be received;

d. The dollar amount received or expected to be received under each statute for each year;

Objection to Interrogatory 2:

See objection to Interrogatory 1.

3. Identify each and every particular program and function to which the federal financial assistance was allocated for each year designated above (including, but not limited to, the amounts allocated to equipment, supplies, remedial reading, payment of salaries of school district employees, including teachers; training of teachers, recertification of school employees, research-type grants to school district employees, and special education programs) and identify the dollar amount of such assistance allocated for each program or function.

Objection to Interrogatory 3:

See objection to Interrogatory 1.

THE PLAINTIFF
THE TRUMBULL BOARD
OF EDUCATION

By: /s/ Paul E. Knag
PAUL E. KNAG
Its attorney
Cummings & Lockwood
One Atlantic Street
Stamford, Connecticut 06904
(203) 327-1700

CERTIFICATION

This is to certify that a copy of the foregoing Objections has been mailed, postage prepaid, to all counsel of record this 4th day of May, 1979.

/s/ Paul E. Knag
PAUL E. KNAG

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. B-78-401

THE TRUMBULL BOARD OF EDUCATION, PLAINTIFF

vs.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE and LINDA POTZ, DEFENDANTS

May 4, 1979

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiff, The Trumbull Board of Education, hereby moves for summary judgment and respectfully requests that the Court enter an order, in the form attached (which is substantially identical to the judgment entered by this Court in *North Haven Board of Education* vs. *Califano, et al*), ordering and adjudging as follows:

1. That summary judgment be entered in favor of the plaintiff;

2. That the regulations set forth in 45 C.F.R. §§ 86.51-86.61, inclusive, be declared invalid, void and of no effect whatsoever; and

3. That the defendants, their agents, employees, and persons acting in concert or participation with them be permanently enjoined from terminating or refusing to grant, or attempting to terminate or refuse to grant, fed-

eral financial assistance to plaintiff for any alleged non-compliance with said regulations.

Respectfully submitted,
THE PLAINTIFF
THE TRUMBULL BOARD
OF EDUCATION

By: /s/ Paul E. Knag
PAUL E. KNAG
Cummings & Lockwood
One Atlantic Street
Stamford, Connecticut 06904
(203) 327-1700

CERTIFICATION

This is to certify that a copy of the foregoing Motion has been mailed, postage prepaid, to all counsel of record this 4th day of May, 1979.

/s/ Paul E. Knag
PAUL E. KNAG

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Civil No. B-78-401

THE TRUMBULL BOARD OF EDUCATION, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, ET AL., DEFENDANTS

FEDERAL DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The issue presented in this case, whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, authorizes the defendant Department of Health, Education and Welfare (HEW) to promulgate and enforce regulations, 45 C.F.R. §§ 86.51-86.61, prohibiting sex discrimination against employees of educational institutions receiving federal financial assistance, has already been decided by this Court in *North Haven Board of Education* v. *Califano, et al.*, Civil No. N-78-165 (D. Conn., April 24, 1979).

Because HEW's views as to the scope of its authority under Title IX were fully presented to the Court in *North Haven*, there is no need and hence HEW does not intend to file an additional brief in this case.

Respectfully submitted,

By: /s/ Barbara Allen Babcock
BARBARA ALLEN BABCOCK
Assistant Attorney General

By: /s/ Richard Blumenthal
RICHARD BLUMENTHAL
United States Attorney

By: /s/ Hugh W. Cuthbertson
HUGH W. CUTHBERTSON
Assistant United States Attorney

FILED
MAY 10 12 44 PM '79
CLERK
U.S. DISTRICT COURT
BRIDGEPORT, CONN

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

THE TRUMBULL BOARD OF EDUCATION, Plaintiff	CIVIL ACTION NO. B 78-401
vs.	
UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE	
and	
LINDA POTZ,	
Defendants	MAY 7, 1979

MOTION TO COMPEL ANSWERS TO PLAINTIFF'S INTERROGATORIES OF DECEMBER 29, 1978

Pursuant to Rule 37 F. R. Civ. P., Defendant Linda Potz respectfully moves this Court for an order compelling the Plaintiff Trumbull Board of Education to answer Paragraphs 1 through 3 of Defendant Potz's First Set of Interrogatories to Plaintiff.

Such an order is sought to enable the Plaintiff to present an adequate factual background to support a motion for summary judgment and, if necessary, to present an adequate factual record for review of this action on appeal. The information requested is relevant and material to the issues raised by the Plaintiff's complaint.

FILED
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U.S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. B 78-401

THE TRUMBULL BOARD OF EDUCATION, PLAINTIFF

vs.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE and LINDA POTZ, DEFENDANTS

June 22, 1979

MOTION FOR SUMMARY JUDGMENT OF DEFENDANT LINDA POTZ

Pursuant to Rule 56 F.R.Civ. P., Defendant Linda Potz hereby moves for summary judgment and respectfully requests that the Court enter the attached order, which is sought on the following grounds:

1. The Plaintiff, Trumbull Board of Education is an educational institution which in 1975-76, 1976-77, 1977-78 and 1978-79 received federal financial assistance;

2. Pursuant to an administrative complaint filed by Defendant Potz, the Office for Civil Rights of the United States Department of Health, Education and Welfare (HEW) investigated and made findings of violations of Title IX of the Education Amendments of 1972 by the Plaintiff, Trumbull Board of Education;

3. As a result of its investigation, HEW concluded that the Plaintiff had committed multiple violations of Title IX and of HEW regulations effectuating the statute. The violations are set forth in Exhibit A attached hereto;

4. On September 20, 1978, HEW issued a directive ordering the Plaintiff to put itself into compliance with

Title IX by submitting a plan for corrective action which was to include reinstatement of Defendant Potz to her employment with back pay and removal of any and all adverse materials from Defendant Potz' personnel file. (See Exhibit A);

5. The Plaintiff has refused to comply with HEW's directive and, to date, has not reinstated Defendant Potz to her employment;

6. HEW's directive is a valid administrative order which must be obeyed by the Plaintiff.

WHEREFORE, summary judgment should enter on behalf of Defendant Linda Potz.

DEFENDANT, LINDA POTZ

By: /s/ Beverly J. Hodgson
BEVERLY J. HODGSON
Koskoff, Koskoff & Bieder, P.C.
1241 Main Street
Bridgeport, Connecticut 06604
(203) 336-4421

CERTIFICATION

This is to certify that a copy of the foregoing was mailed, postage prepaid, to Attorney Paul Knag, Cummings & Lockwood, One Atlantic Street, Stamford, Connecticut 06904 and Attorney Kathy Olesker, U.S. Department of Justice, Civil Division, 10th and Pennsylvania Avenue, N.W., Room 3513, Washington, D.C. 20530 on the above-mentioned date.

/s/ Beverly J. Hodgson
BEVEBLY J. HODGSON

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. B 78-401

THE TRUMBULL BOARD OF EDUCATION, PLAINTIFF

vs.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE and LINDA POTZ, DEFENDANTS

June 20, 1979

AFFIDAVIT OF LINDA POTZ EVANKO

Defendant LINDA POTZ EVANKO submits the following affidavits in support of her Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and of her Motion for Summary Judgment.

LINDA POTZ EVANKO, being duly sworn, deposes and states:

1. I am a defendant in this action;
2. I have personal knowledge of the facts set forth in this Affidavit;
3. From August, 1975 to June, 1977, I was employed as a junior high school guidance counselor by the Trumbull Board of Education;
4. During the second year of my employment, my time was divided between two junior high schools;
5. At both junior high schools, all the other guidance counselors were male; and I was the only female guidance counselor at the junior high school level in the Trumbull Public Schools;

6. During my employment, female students who were assigned to the male guidance counselors often came to see me instead. During these counseling sessions, they raised problems of female physical development, social problems or other concerns which they said they could discuss more comfortably with me.

7. In many instances, female students effected informal transfers to me and away from the male guidance counselor to which they were assigned. In many more instances, female students sought me out for discussions of gender-related problems in addition to their regular counseling appointments with the male guidance counselor to which they were assigned;

8. As a result of counseling sessions with female students who were not assigned to me, I saw and counseled more students than did my male colleagues;

9. When my employment was terminated, a male was hired to fill my position at Madison Junior High School;

10. My training as a guidance counselor indicates, and my experience as a guidance counselor in the public schools of Bridgeport and Trumbull confirmed, that female students are often reluctant to discuss gender-related problems with counselors of the opposite sex and that a guidance staff should include both male and female counselors in order to be able to meet the counseling needs of the whole student body in coeducational schools.

/s/ Linda Potz Evanko
LINDA POTZ EVANKO

Sworn to and subscribed before me this 19th day of June, 1979.

/s/ _____
Commissioner of the Superior Court

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Office-Supreme Court, U.S.
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JAN 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-986

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE NORTH HAVEN BOARD OF EDUCATION, PETITIONER

v.

SHIRLEY M. HUFSTEDLER, ET AL.

THE TRUMBULL BOARD OF EDUCATION, PETITIONER

v.

UNITED STATES DEPARTMENT OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

WADE H. MCCREE, JR.
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

WALTER W. BARNETT
MARIE E. KLIMESZ
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-986

THE NORTH HAVEN BOARD OF EDUCATION, PETITIONER

v.

SHIRLEY M. HUFSTEDLER, ET AL.

THE TRUMBULL BOARD OF EDUCATION, PETITIONER

v.

UNITED STATES DEPARTMENT OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

QUESTION PRESENTED

Whether Sections 901(a) and 902 of the Education Amendments of 1972, 20 U.S.C. 1681(a) and 1682, authorize the Department of Education to issue regulations prohibiting sex discrimination in the employment practices of school districts and educational institutions receiving federal financial assistance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20A-48A-2) is reported at 629 F. 2d 773. The opinions of the district court in *North Haven* (Pet. App. 51A-75A) and *Trumbull* (Pet. App. 76A) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1980. A petition for rehearing was denied on October 24, 1980 (Pet. App. 49A-50A). The petition for a writ of certiorari was filed on December 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. The pertinent portions of the statute involved (Sections 901(a) and 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a) and 1682) are printed at pages 1A-8A of the petition.

2. The pertinent regulations (34 C.F.R. 106.51 and 34 C.F.R. 106.57) are printed respectively at pages 8A-11A and 15A-17A of the petition.

STATEMENT

These consolidated cases were brought by two Connecticut school districts to challenge the authority of the Department of Health, Education, and Welfare (HEW)[1] to issue regulations prohibiting sex discrimination in the employment practices of educational institutions operating federally assisted education programs and activities (Pet. App. 23A-25A).

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[1]The functions of HEW under Title IX of the Education Amendments of 1972 were transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678; and, in the court of appeals, the Secretary of Education was substituted as appellant in place of the Secretary of HEW. Because all of the relevant actions in this case were taken by HEW prior to the reorganization, it will be necessary to refer to that agency in addition to the Department of Education in this brief.

1. *North Haven.* The North Haven Board of Education receives federal financial assistance in support of its education programs and activities, and it is therefore subject to the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* (hereinafter "Title IX"), and to authorized implementing regulations promulgated by the federal departments and agencies through which it receives such financial assistance (Pet. App. 23A). Since the 1975-1976 school year, the school board has used a substantial portion of its federal financial assistance to pay salaries of its employees (*ibid.*).

On January 10, 1978, HEW notified North Haven that it had received a complaint alleging that the school district was in violation of Title IX in its hiring policies and in the terms and conditions of employment, and it requested that North Haven provide information concerning its policies on hiring, leaves of absence, seniority, and tenure (Pet. App. 23A-24A). North Haven refused to supply the requested information, asserting that HEW had no authority to regulate employment practices under Title IX (Pet. App. 24A). HEW then notified the school district that because of its refusal to provide information the matter had been referred to the appropriate office for possible administrative enforcement action (*ibid.*). Thereafter North Haven filed this action against the Secretary of HEW and certain regional HEW officials seeking a declaratory judgment that the regulations then contained in 45 C.F.R. Part 86, Subpart E (1978), which prohibit sex discrimination in the employment practices of federal education aid recipients, are in excess of the authority conferred by Congress under the statute.[2] It also

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[2]These regulations were recodified in 34 C.F.R. Part 106, Subpart E (1980), in connection with the establishment of the Department of Education, 45 Fed. Reg. 30802, 30962 *et seq.* (1980).

sought an injunction prohibiting HEW from attempting to terminate federal financial assistance to the school district based upon alleged noncompliance with Subpart E (*ibid.*). The parties filed cross-motions for summary judgment, and on April 24, 1979, the court granted North Haven's motion. Adopting the reasoning of the decisions of several district courts and of the court of appeals in *Islesboro School Committee* v. *Califano*, 593 F. 2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979), the court held that the prohibitions of Title IX do not apply to employment practices (Pet. App. 51A-72A).

Summarizing the conclusions of the district court in *Romeo Community Schools* v. *HEW*, 438 F. Supp. 1021 (E.D. Mich. 1977), aff'd, 600 F. 2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979), the court concluded (Pet. App. 64A, quoting *Romeo Community Schools* v. *HEW*, *supra*, 438 F. Supp at 1032) that the language of Section 901 of Title IX prohibits sex discrimination only against students and that "[t]eachers * * * are hard pressed to fit themselves within the plain meaning of § 1681's prohibitory language, general as it may appear on its face."

The court recognized that Title IX, patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, included no provision like Section 604 of Title VI, which excludes employment generally from the coverage of the statute; but it reasoned that such a provision was omitted from Title IX because it would have been inconsistent with other portions of the Title IX legislative package rather than because Congress intended employment to be covered under Section 901 (Pet. App. 61A-62A).

The court found further support for its reading of Section 901 in its conclusion that Congress could not have intended to provide for termination of federal financial assistance to a school district where there was discrimination against teachers but not direct discrimination against students (Pet.

App. 65A-66A). Finally, it concluded that Section 902 of the statute, which limits the effect of termination of assistance to "the particular program, or part thereof, in which * * * noncompliance has been * * * found" is inconsistent with regulation of employment practices, because they are not "program-specific" (Pet. App. 66A-67A).

2. *Trumbull.* Like North Haven, the Trumbull Board of Education receives federal financial assistance in support of its education programs and activities and is, therefore, subject to the provisions of Title IX and its implementing regulations (Pet. App. 24A). HEW investigated a complaint, filed under Title IX by respondent Linda Potz, a former guidance counselor in the Trumbull school district, alleging that Trumbull had discriminated against her on the basis of sex in job assignments, working conditions, and the non-renewal of her contract (*ibid.*). On September 20, 1978, HEW notified Trumbull that it had concluded that the school district was in violation of Title IX and requested that corrective action be taken (Pet. App. 25A).[3]

Trumbull declined to take the corrective action requested by HEW and instead, on October 18, 1978, filed this action seeking a declaration that HEW's Title IX employment regulations are invalid and an injunction forbidding HEW from attempting to enforce those regulations against the school district (Pet. App. 25A). The district court granted

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[3]Specifically, HEW found that Potz was required to perform tasks such as typing and running errands, which were not part of her duties as a guidance counselor and which male counselors were not required to perform, that her office was moved to a smaller, poorly heated and less comfortable space, in the gymnasium, away from other other counselors, and that she was asked to change a report showing that she had seen 150 students in a given week because the number was much higher than the number seen by her male colleagues. Finally, HEW found that Potz's sex was the motivating factor in the school district's decision not to renew her contract (Pet. App. 24A-25A).

Trumbull's motion for summary judgment on May 24, 1979, for the reasons set forth in its decision in *North Haven* (Pet. App. 76A).[4]

3. *The decision of the court of appeals.* The court of appeals consolidated the cases and reversed the judgments appeals consolidated the cases and reversed the judgments of the district court (Pet. App. 20A-48A-2). The court concluded that the legislative history and the purpose of the statute support HEW's interpretation of its language as prohibiting employment discrimination (Pet. App. 32A). The court noted that the remarks of the sponsor of the portion of the bill that became Title IX indicated an intention to prohibit employment discrimination through Section 901 of Title IX as well as through amendments to Title VII of the Civil Rights Act of 1964 and the Equal Pay Act, 29 U.S.C. 213(a) (Pet. App. 33A-41A). The court also relied upon conference committee action deleting a provision of the House bill similar to that contained in Section 604 of Title VI of the Civil Rights Act of 1964, which would have excluded most employment practices from the operation of the statute; it disagreed with the other courts of appeals that the deletion was made simply to avoid an internal inconsistency in the bill (Pet. App. 42A-43A).

The court found it "not without significance" (Pet. App. 43A) that Congress undertook a statutorily mandated review of the regulations and failed "to adopt resolutions, *along with bills and amendments*, specifically designed to exempt employment from HEW regulation after hearing arguments on both sides" (Pet. App. 46A, emphasis in original). The court further concluded that the fact that

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[4]Because the court granted summary judgment before respondent Potz had an opportunity to respond to Trumbull's motion, Potz filed a motion to set aside the judgment and a cross-motion for summary judgment. The district court denied both motions on September 13, 1979 (Pet. App. 77A-93A).

there is some overlap of jurisdiction in employment discrimination does not mean that Congress intended to exclude it from Section 901, but indicates instead that Congress intended both to give HEW the termination remedy and to provide additional remedies for individual employees under Title VII and the Equal Pay Act (Pet. App. 46A-47A).

The court rejected the argument that Congress could not have intended to penalize students because of discrimination against faculty members, observing (Pet. App. 47A) that the termination sanction would have this broad reach even if employment practices were not covered, since it can be used to terminate funds for a program benefiting many students even where the discrimination affects only a few. Given the "grave congressional concern over sex discrimination" in educational employment, the court concluded (*ibid.*) that Congress intended HEW to have the same authority to combat it as it has to combat discrimination involving students.

Finally, the court concluded that Section 902, limiting the effect of HEW's power to terminate funds to "the particular program or part thereof, in which * * * noncompliance [with the regulations] has been * * * found," is not a limitation on the power to prohibit employment discrimination by broad regulations (Pet. App. 48A-1-48A-2).[5]

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[5]Because of its decision that employment is covered, the court did not reach the question whether HEW has a narrower authority to issue regulations prohibiting sex discrimination against employees to the extent that such discrimination also constitutes discrimination against students (Pet. App. 48A-2).

DISCUSSION

The question presented in this case is identical to the question presented in *United States Department of Education* v. *Seattle University*, petition for certiorari granted December 1, 1980, No. 80-493, and it is similar to the question in *Hufstedler* v. *Dougherty County School System*, petition for a writ of certiorari filed December 22, 1980, No. 80-1023.

For the reasons set forth in our petition in *Seattle University*, we believe that the decision of the court of appeals in this case is correct. Because that petition raises the same question presented in this case, we would normally ask the Court to hold this petition pending its decision in *Seattle University*. However, following the grant of certiorari in *Seattle University*, the respondent University filed papers indicating its intent not to file a brief or participate further in the case because it believed there was no live controversy. The position represented by the opinion of the court of appeals in that case will therefore not be adequately presented to the Court in that case unless special measures are taken.

In response to a request from the Clerk, we expressed our views on this development by letter, dated January 6, 1981, explaining that we believed the mootness question had been fully aired in the Court before the grant of certiorari in *Seattle University* and that we would proceed with our briefing of that case.[6] We noted, however, that the Court might wish to appoint counsel as *amicus curiae* to file a brief in support of the judgment on review in that case, or to

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[6]We have previously provided a copy of the petition in No. 80-493 to all parties in this case. We are now providing to counsel for all parties copies of our petition in No. 80-1023 and our January 6, 1981, letter to the Clerk concerning Seattle University's motion to permit withdrawal of counsel.

vacate the grant of certiorari in that case and grant the petition either in the present case or in *Hufstedler* v. *Dougherty County School System*, No. 80-1023. (We also asked that, in the event the Court took the latter course, it hold the petition in *Seattle University* pending the decision in the case in which the issue was briefed and argued.)

We reaffirm that position here. If the Court decides that briefing and argument in *Seattle University* should go forward, then the petition in this case should be held for disposition in the light of its decision in *Seattle University*. (Similarly, if the Court were to grant the petition in *Dougherty County*, and decide the employment practices issue in that case, then this petition should be held pending the decision in *Dougherty County*.) If the Court decides instead to defer disposition of *Seattle University*, we would not oppose the grant of the petition in this case.

CONCLUSION

The Court should defer disposition of the petition in this case pending its decision in *United States Department of Education* v. *Seattle University*, No. 80-493, or its decision

in *Hufstedler* v. *Dougherty County School System*, No. 80-1023, should it grant the petition in that case. If the Court vacates its order granting the petition for certiorari in *Seattle University*, however, it should grant the petition in this case.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

WALTER W. BARNETT
MARIE E. KLIMESZ
Attorneys

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No. 80-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE NORTH HAVEN BOARD OF EDUCATION, *Petitioner,*

v.

TERREL BELL, *et al., Respondents,*

and

THE TRUMBULL BOARD OF EDUCATION, *Petitioner,*

v.

UNITED STATES DEPARTMENT OF EDUCATION AND LINDA POTZ, *Respondents,*

On A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONERS NORTH HAVEN BOARD OF EDUCATION AND TRUMBULL BOARD OF EDUCATION

SUSAN K. KRELL
SIEGEL, O'CONNOR & KAINEN, P.C.
60 Washington Street
Hartford, CT 06106
(203) 547-0550

Counsel for Petitioner
The North Haven Board of Education

CLIFFORD R. OVIATT, JR.
PAUL E. KNAG
RICHARD W. RUTHERFORD
CUMMINGS & LOCKWOOD
1090 Vermont Avenue, N.W.
Suite 650
Washington, D.C. 20005
(202) 842-3323

Counsel for Petitioner
The Trumbull Board of Education

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether the Department of Health, Education and Welfare's (hereinafter "HEW") comprehensive employment discrimination regulations now codified at 34 C.F.R. Part 106, Subpart E, §§ 106.51-106.61 (hereinafter Subpart E) are illegal, as beyond the authority conferred by §§ 901(a) and 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681(a) and 1682.[1]

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[1] The relevant functions of HEW were transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, 20 U.S.C. § 3441(a). Since many of the relevant actions in this case were taken by HEW prior to the reorganization, this brief refers to that agency throughout for consistency. Thus, where appropriate, "HEW" should be deemed to include, or refer to, the Department of Education. The Subpart E regulations were originally codified at 45 C.F.R. Part 86, Subpart E, §§ 86.51-86.61.

PARTIES

The caption of the case in this Court contains the names of all parties except Robert R. Randolph, Director of Region I of the Office for Civil Rights, Department of Education, and Maria C. Montalvo, Chief of the Elementary and Secondary Education Branch of Region I, who are respondents in the North Haven case.

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24. 118 Cong. Rec. 5807 (1972).....67,72

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OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is reported at 629 F.2d 773. Its denial of the Petition for Rehearing is not officially reported (Cert. Pet. App. C). The opinions of the district court are not officially reported (Cert. Pet. App. D-1, D-2, E-1 & E-2). The North Haven district court decision is unofficially reported in 19 FEP Cases 1505 (D. Conn. 1979).

JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on July 24, 1980, and a Petition for Rehearing en banc was denied on October 24, 1980. On December 16, 1980, the petition for a writ of certiorari was filed with this Court, and was granted on February 23,

1981. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. § 1254(1). On March 18, 1981, the petitioners' time to file this brief was extended to and including May 9, 1981; on April 15, 1981, that time was further extended to and including June 25, 1981.

STATUTES AND REGULATIONS INVOLVED

This case involves the following statutes and regulations (Cert. Pet. App. A):

1. Sections 901(a) and 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681(a) and 1682.

2. The regulations of the Department of Education, 34 C.F.R. Subpart E §§ 106.51-106.61.

STATEMENT OF THE CASE

Title IX of the Education Amendments of 1972 represented a legislative effort to counter sex discrimination in educational institutions. Portions of Title IX amended the existing statutes that prohibited employment discrimination to close loopholes that had worked to the detriment of employees of educational institutions. Sections 901 and 902 of that legislation were enacted to prohibit sex discrimination against the beneficiaries of federally financed programs, a prohibition lacking from the existing law protecting such beneficiaries.

Regulatory power under § 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (hereinafter "§ 901") was given to HEW under § 902 of Title IX, 20 U.S.C. § 1682 (hereinafter "§ 902"). That agency promulgated no

regulations under Title IX, §§ 901 and 902, until 1975, when what is now 34 C.F.R. Part 106, was issued in final form. The majority of those regulations concern sex discrimination against student beneficiaries of federal aid and are not at issue in this case. What is at issue is Subpart E of those regulations wherein HEW attempts to assume jurisdiction over employment discrimination by educational institutions on the basis of sex. In fact, the EEOC and the Department of Labor were given jurisdiction over sex discrimination in employment in the educational field by virtue of provisions of Title IX amending the Equal Pay Act, 29 U.S.C. § 206(d) (hereinafter the "Equal Pay Act") and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (hereinafter "Title VII").

After these Subpart E regulations became effective, charges of sex discrimination in employment were filed with HEW against petitioners, the North Haven Board of Education (hereinafter "North Haven") and the Trumbull Board of Education (hereinafter "Trumbull"), local Connecticut school boards. HEW processed both complaints, claiming authority by virtue of Subpart E of its regulations. Both school boards pointed out that Subpart E exceeded HEW's authority and requested that HEW not proceed. North Haven also requested, in the alternative, that HEW hold its investigation in abeyance pending the decision of the Connecticut District Court in Dove v. Fritts et al., Civil Action No. N-77-501 in which the Subpart E regulations were challenged. However, HEW persisted and demanded cooperation, under threat of

administrative enforcement proceedings leading to the termination of federal financial aid, which is substantial. No HEW investigation of North Haven occurred, as North Haven promptly filed suit after being advised of HEW's refusal to hold its investigation in abeyance. Trumbull, which also receives substantial federal financial assistance, cooperated with HEW's investigation, at the end of which HEW, by letter, claimed that Trumbull had violated the Subpart E regulations and demanded that Trumbull agree, again under threat of a fund cutoff, to HEW's remedial plan for corrective action.*

*See N.H.R. Dmt. Nos. 2, 12, 13; TR.R. Dmt. Nos. 1, 2, 16 and 17 (the complaints, answer and summary judgment papers). References are to the North Haven and Trumbull Records, respectively. While the parties have moved to dispense with the joint appendix, the government is proposing to supply an appendix with its brief.

The school boards brought separate suits in the District of Connecticut,[2] seeking injunctive and declaratory relief against the further use of Subpart E by HEW. (N.H.R. Dmt. No. 2; TR.R Dmt. No. 1)

In North Haven's case, HEW filed a Motion to Dismiss, or, in the Alternative, for Summary Judgment, and North Haven cross-moved for summary judgment. On April 26, 1979, Judge Ellen Bree Burns granted North Haven's motion, declaring Subpart E to be invalid, void and of no effect whatsoever, and permanently enjoined HEW from attempting to cut off federal aid to North Haven for

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[2]Had Trumbull not brought suit at this point, administrative hearings on the merits of the purported findings would have been the next step in HEW's enforcement efforts. See 34 C.F.R. § 100.8

alleged noncompliance with the regulations. (N.H.R. Dmt. Nos. 12, 13, 16, 17)

Following Judge Burns' decision in North Haven, Trumbull, whose case had also been assigned to Judge Burns, likewise moved for summary judgment. While the government declined to file a brief, noting that the North Haven decision controlled Trumbull's case, respondent Potz, who had filed the HEW complaint against Trumbull, filed a cross-motion for summary judgment and sought discovery. Pursuant to court permission, Trumbull deferred response to the claims made in that cross motion. (TR.R. Dmt. Nos. 10, 16, 25, 26)

The district court granted Trumbull's motion for summary judgment on May 24, 1979, relying upon the North Haven decision, and, when Potz moved to open the judgment, issued a separate

opinion rejecting Potz's additional claims based on this Court's decision in Cannon v. University of Chicago, 441 U.S. 677 (1979) (Title IX permits a private right of action to a student or would-be student). The court also found no need for Trumbull to respond to Potz's factual claims and denied the cross-motion for summary judgment. (TR.R. Dmt. Nos. 21, 26)

The subsequent appeals by Potz and HEW in both cases were held inactive pending action by this Court on petitions for certiorari in three of the cases which had declared the regulations in Subpart E invalid. [Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir. 1979), cert. denied, 444 U.S. 972 (1979); Islesboro School Committee v. Califano, 593 F.2d 424 (1st Cir. 1979), cert. denied, 444 U.S. 972 (1979); and Junior

College District of St. Louis v. Califano, 597 F.2d 119 (8th Cir. 1979), cert. denied, 444 U.S. 972 (1979).] When certiorari was denied in all three cases, the cases herein were consolidated for briefing and argument, and were reactivated.

On July 24, 1980, the Court of Appeals ruled, reversing and remanding for further proceedings both judgments by the district court, and thus became the only court in the country to uphold the Subpart E regulations.

Petitioners moved for rehearing on August 7, 1980, which was denied on October 24, 1980. On February 23, 1981, North Haven's and Trumbull's joint petition for a writ of certiorari was granted by this Court.

Meanwhile, the two claimants whose charges triggered this litigation have continued to pursue a barrage of other remedies in addition to their Title IX administrative claims. Elaine Dove, who filed the HEW complaint against North Haven, also filed charges with the Equal Employment Opportunity Commission (EEOC Charge No. 011780551), and filed a federal court suit alleging violations of Title VII and 42 U.S.C. § 1983, as well as Title IX violations.

Linda Potz, who filed the HEW complaint against Trumbull, also availed herself of other forums by filing an EEOC complaint (EEOC Charge No. 011791590), an appeal to the Connecticut Freedom of Information Commission (#F.I.C.-77-156), an appeal to the Connecticut Court of Common Pleas (D.N.

1183125, Fairfield County at Bridgeport), a Connecticut State Labor Board unfair labor practice charge (T.P.P. 3963), and a civil action in the United States District Court in Connecticut, Civil Action No. B-81-210, as well as seeking relief through contractual grievance procedures. She has also sued Shirley Blumin, Director of Pupil Services in Trumbull, in Superior Court (D.N. 165640, Superior Court, Fairfield County at Bridgeport) for five hundred thousand dollars ($500,000) damages for allegedly falsely stating that Potz was incompetent.

SUMMARY OF ARGUMENT

The Subpart E regulations promulgated by HEW under Title IX of the Education Amendments of 1972 purport to

regulate sex discrimination in employment. To date, there have been seventeen (17) decisions declaring Subpart E to be illegal.[3] Only the Second Circuit Court of Appeals, in its decision below, has held otherwise.

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[3] Romeo Community Schools v. HEW, 438 F. Supp. 1021 (E.D. Mich. 1977) ("Romeo I"), aff'd, 600 F.2d 581 (6th Cir. 1979) ("Romeo II"), cert. denied, 444 U.S. 972 (1979); Brunswick School Board v. Califano, 449 F. Supp. 866 (D. Me. 1978) ("Islesboro I"), aff'd sub nom. Islesboro School Committee v. Califano, 593 F.2d 424 (1st Cir.) ("Islesboro II"), cert. denied, 444 U.S. 972 (1979); Dougherty County School System v. Califano, 19 FEP Cases 688 (M.D. Ga. 1978) ("Dougherty I"), [aff'd sub nom. Dougherty County School System v. Harris, 662 F.2d 735 (5th Cir. 1980), cert. pending, No. 80-1023]; Junior College District of St. Louis v. Califano, 455 F. Supp. 1212 (E.D. Mo. 1978) ("Junior College I"), aff'd, 597 F.2d 119 (8th Cir. 1979) ("Junior College II"), cert. denied, 444 U.S. 972 (1979); Seattle University v. HEW, 16 FEP Cases 719 (W.D. Wash. 1978) ("Seattle I"), aff'd, 621 F.2d 992 (9th Cir.) ("Seattle II"), cert. granted, 101 S. Ct. 563 (1980); Auburn School District v. HEW,

footnote 3 continued

19 FEP Cases 1504 (D.N.H. 1979); Board of Education of Bowling Green City School District v. HEW, 19 FEP Cases 457 (N.D. Ohio 1979) ("Bowling Green"); North Haven Board of Education v. Califano, 19 FEP Cases 1505 (D. Conn. 1979), rev'd sub nom. North Haven Board of Education v. Hufstedler, 629 F.2d 773 (2d Cir. 1980), cert. granted sub nom. North Haven Board of Education v. Bell, 101 S. Ct. 1345 (1981) ("North Haven"); Trumbull Board of Education v. HEW, No. B-78-401 (D. Conn. May 31 and Sept. 13, 1979), rev'd, 629 F.2d 773 (2d Cir. 1980), cert. granted, 101 S. Ct. 1345 (1981) ("Trumbull"); University of Toledo v. HEW, 464 F. Supp. 693 (N.D. Ohio 1979) ("Toledo"); Grove City College v. Harris, 500 F. Supp. 253 (W.D. Pa.) ("Grove City College"), appeal pending, Nos. 80-2383, 80-2384 (3d Cir. 1980); In the Matter of Hillsdale College and State of Michigan, Docket No. A-7 (HEW Administration Proceeding, August 23, 1978), Petition for Review of Order filed, No. 80-3207 (6th Cir. 1980) ("Hillsdale"). In addition, just after the Second Circuit rendered its opinion in this matter, the Fifth Circuit issued an opinion declaring Subpart E to be illegal. Dougherty County School System v. Harris, 622 F.2d 735 (5th Cir. 1980), [cert. pending No. 80-1023] ("Dougherty II"). See also Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979); Kneeland v. Bloom Township High School District, 484 F. Supp. 1280 (N.D.

These regulations are invalid because: (1) Sections 901 and 902 of Title IX, upon which these regulations are predicated, are directed at beneficiaries of federally financed education programs, not employees, and (2) the Subpart E regulations are not limited to the particular programs or part thereof receiving federal aid as § 902 of Title IX mandates.

The key language of § 901 under which HEW claims authority to regulate employment discrimination parallels directly § 601 of Title VI of the Civil

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footnote 3 continued

Ill. 1980); Hoth v. Grinnell College, 23 FEP Cases 528 (S.D. Iowa 1980); Sobel v. Yeshiva University, 477 F. Supp. 1161 (S.D.N.Y. 1979), as to the absence of a private right of action for employment discrimination.

Rights Act of 1964, 42 U.S.C. §§ 2000d et seq. (hereinafter "Title VI" or "§ 601"). The legislative history of that Title VI language indicates that when § 601 was being considered by Congress, Attorney General Kennedy, the Justice Department, Senator Humphrey (the Senate floor leader), Congressman Celler (the House floor leader) and others made clear that such language was not intended to cover employment discrimination. Rather, employment discrimination was to be covered by Title VII, as well as by the Equal Pay Act.

Following this model, the Title IX Education Amendments of 1972 dealt with sex discrimination against beneficiaries of federal aid by adopting in § 901 language substantially identical to

§ 601. Title IX addressed employment discrimination by amending Title VII and the Equal Pay Act to close loopholes which prevented their application to employment discrimination by educational institutions against their various employees. To accomplish this, it was necessary to eliminate proposed language providing that nothing in Title IX covered employment, language which would have been inconsistent with the amendments to Title VII and the Equal Pay Act.

Congress proceeded to engraft upon the language of § 601 of Title VI exceptions and qualifications directed at students, not employees. Reflecting the understanding that the language used in § 901 did not cover employment, the Justice Department proposed language for Title IX which would have expressly

included employment discrimination under the coverage of § 901. This was not adopted. Instead, witnesses testifying at the House hearings seemed content with the proposal to address sex discrimination in employment by amending Title VII and the Equal Pay Act. In addition, other legislative history, including floor remarks of Sen. Bayh, supports the proposition that § 901 is intended to cover beneficiaries of federal funds, rather than employees, that Title IX is just like Title VI and that employment is covered by the amendments to Title VII and the Equal Pay Act.

Whether § 901 might in some cases permit HEW to deal with sex discrimination in employment in those narrow circumstances where there is a pattern of sex discrimination against teachers or other employees of educational

institutions which somehow might result in sex discrimination against students, or in cases where the employees are the intended beneficiaries of federal aid, is not at issue in this case. No such showing is required by Subpart E. Rather, Subpart E is directed at employment per se and hence is invalid.

Further, Subpart E is not "program specific," and thus conflicts with the limited mandate of the provisions of §§ 901 and 902. Section 901 is expressly limited by its terms to discrimination in an "education program or activity receiving Federal financial assistance" and § 902 limits the scope of § 901 of Title IX to the "particular program or part thereof," while requiring that the regulations under Title IX be directed to federally funded "program[s] or activit[ies]." The Subpart E regulations

conflict with these provisions because they are not limited to those programs and activities funded by federal money, but purport to cover all programs of an institution receiving federal funds.

Upholding the decision of the district court does not mean that victims of sex discrimination in employment by educational institutions will be without a remedy. Title VII, the Equal Pay Act and the Civil Rights Statute, 42 U.S.C. § 1983, provide adequate forums for such claims to be heard. Intended beneficiaries of federally funded programs should not be penalized when other perfectly adequate remedies specifically directed to problems of employment discrimination exist.

Therefore, this Court should reverse the judgment of the Second

Circuit and reinstate the summary judgments granted by the district court.

ARGUMENT

SUBPART E OF THE TITLE IX REGULATIONS IS ILLEGAL

Preliminary Statement

These actions challenge the validity of Subpart E of HEW's regulations under Title IX of the Education Amendments of 1972. This challenge to the regulations was made because North Haven and Trumbull were threatened with termination of federal financial aid by HEW, in response to charges of sex discrimination filed by individuals. These actions do not address the merits of the claims of sex discrimination,[4] but rather

[4] HEW and Potz cannot prove their charges of sex discrimination by winning this

call for this Court to determine the legal question of the validity of these regulations.

I. THE SUBPART E REGULATIONS ARE INVALID BECAUSE HEW'S AUTHORITY UNDER TITLE IX, AS SET OUT IN §§ 901 AND 902, IS LIMITED TO DISCRIMINATION AGAINST BENEFICIARIES OF FEDERAL FINANCIAL ASSISTANCE AND DOES NOT ENCOMPASS DISCRIMINATION AGAINST EMPLOYEES PER SE.

A. Title IX Of The Education Amendments Of 1972, Like The Civil Rights Act Of 1964, Treats Discrimination Against Beneficiaries Of Federal Funds Separately From Employment Discrimination.

Title IX of the Education Amendments of 1972 was a multi-part

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footnote 4 continued

case, any more than Trumbull and North Haven can exonerate themselves by obtaining a ruling that HEW's regulations are illegal. These lawsuits raise solely the issue of the validity of Subpart E. See Romeo I, supra, 438 F. Supp. at 1028, which explains that facts are irrelevant in a suit such as this which challenges the legality of the regulations.

legislative package designed to combat sex discrimination in educational institutions on a number of fronts.

Prior to the passage of Title IX, there were three major loopholes in the statutory coverage of discrimination which, in net effect, permitted educational institutions to discriminate against students and employees on the basis of sex.

The first loophole was in Title VI, which prohibited discrimination based on race and color against beneficiaries of federal aid, such as students, but made no mention of sex. The second loophole was in Title VII, which prohibited sex discrimination in employment, but did not cover the employees of a state or political subdivision thereof or employees who "perform work connected with the educational activities" of schools.

Finally, the Equal Pay Act, which prohibited sex discrimination in wages, exempted administrative, executive and professional workers from its coverage.

Title IX was designed, inter alia, to close all three loopholes by amending, in §§ 906 and 908, Title VII and the Equal Pay Act, to remove the exemptions in those statutes, and by adopting as § 901 of Title IX, a provision similar to § 601 of Title VI, to cover sex discrimination against beneficiaries.[5]

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[5]The amendments to Title VII that were passed as part of Title IX were not included in the final codification of Title IX because the same amendments had already been passed as part of the 1972 amendments to the Civil Rights Act of 1964, P.L. 92-261 (see Romeo I, supra, 438 F. Supp. at 1030, n.12). However, Congress never actually voted to delete the Title VII amendments. Rather, those amendments passed both houses and were included in the Conference Committee Report No. 798, reprinted in [1972] U.S.

Thus, Title IX prohibited sex discrimination by educational institutions by directly following the pattern of existing law, i.e., with HEW having jurisdiction over discrimination against beneficiaries of federal funds, as under Title VI, and the Equal Employment Opportunity Commission (hereinafter the "EEOC") and the Department of Labor having jurisdiction over employment discrimination on the basis of sex, pursuant to Title VII and the Equal Pay Act.[6]

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footnote 5 continued

Code Cong. & Ad. News, 2608, 2672 (subpart h). Because Title VII had already been amended in the same manner as § 908 proposed to do, that section was dropped from the final codification.

[6]Jurisdiction over the Equal Pay Act was transferred from the Department of Labor to the EEOC under President Carter's Reorganization Plan No. 1 of 1978, § 1, 43 Fed. Reg. 19,807 (1978), 92 Stat. 3781.

1. The language of § 901 of Title IX is directed at beneficiaries, not employees.

   a. Section 901 of Title IX incorporates almost verbatim the language of § 601 of Title VI.

Discrimination against beneficiaries of federal funds is covered by § 901 of Title IX of the Education Amendments of 1972. This section uses language taken almost verbatim from § 601, except that the word "sex" in § 901 of Title IX replaced "race, color or national origin" in § 601 of Title VI and the word "education" limits the phrase "program or activity."[7] See Cannon, supra, 441 U.S. at 694, 695.

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[7]Section 901 provides that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or

In fact, it was originally proposed that there should be an amendment to Title VI "that would simply have added the word 'sex' to the list of discriminations prohibited by § 601 of Title VI." Cannon, supra, 441 U.S. at 695, n.16.

However, as Representative O'Hara explained, he, as Floor Manager, opted for a new law, separate from Title VI, but adopting its language, in order

footnote 7 continued

> be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that . . .

Section 601 provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

to prevent attempts to gut Title VI by amendments from the floor:

> [I] was very nervous about this effort to amend title VI because it opened up, it made all of title VI open to amendment when we hit the floor with the bill.
>
> If you fiddled around with amending title VI, then you had a problem when you got to the floor with people who would jump up with other amendments to title VI having nothing to do with sex discrimination, and title VI would wind up being gutted on the floor.
>
> So I insisted instead of amending title VI that we write and put into the bill a new title that was equivalent to title VI in terms of discrimination on the basis of sex, but it would not then, in a parliamentarian sense, open

> up title VI to amendments on the floor. . . . It was a cut and paste job. There was a Xerox of [Title VI of] the Civil Rights Act that [the staff] just pasted in. (emphasis added)

Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the Comm. on Education and Labor, House of Representatives -- Review of Regulations to Implement Title IX, 94th Cong., 1st Sess. (1975) (hereinafter "Review Hearings"), at 409.

Additional support for the congressional intent to model § 901 of Title IX after § 601 of Title VI is found in the various statements from the legislative history cited by this Court in Cannon, including the statement of Senator Bayh that "[t]his is identical language, specifically taken from title VI

of the 1964 Civil Rights Act" and his other statement that "[w]e are only adding the 3-letter word 'sex' to existing law." Cannon, supra, 441 U.S. at 694, n.16.

It is not surprising then, that, as this Court noted, "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been . . . ." Cannon, supra, 441 U.S. at 696 and see citations at 696, n.19.

This is especially so here. As this Court stated:

> It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we

> are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.

Id. at 696-698.

Thus, a determination of the intent of Congress in passing § 901 of Title IX should start with an examination of Title VI and its genesis.

b. The legislative history and judicial authority clearly demonstrate that employment discrimination is not within the parameters of § 601.

As originally introduced, Title VI of the 1964 Civil Rights Act included a prohibition of employment discrimination. H.R. 7152, 88th Cong., 1st Sess. (1964).

However, a later draft removed employment discrimination from Title VI, and instead revised and expanded Title VII which covered employment discrimination.

When congressional action on the revised version of § 601 began, § 601 was substantially in its present form, which, as noted earlier, was the basis of § 901 of Title IX.

In the course of congressional consideration of this revised version of § 601, it was repeatedly emphasized that the revised § 601 did not cover employment discrimination. See, e.g., the statement of Senator Ervin: "[t]his change takes out the provisions of the old title VI dealing with what I call

FEPC [Fair Employment Practice Commission], . . ." Civil Rights - The President's Program, 1963: Hearings on S. 1731 and S. 1750 Before the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. (1963), at 335.

Reflecting this, it was generally agreed that a violation of Title VII, i.e., discrimination in employment, would have no "bearing on payments covered by title VI." 110 Cong. Rec. 1602 (1964) (statement of Congressman Mathias).

This is spelled out in a 1964 memorandum the Justice Department prepared for members of Congress during the debate on the 1964 Civil Rights Act, which specified that it was Title VII, not the new Title VI, which prohibited employment discrimination.

Q. What is the relation, if any, between Title VI and Title VII?

A. There is no intended interaction between these titles. Title VI deals with discrimination in connection with federal financial assistance. Title VII prohibits discrimination in employment . . .

Q. Would the fact that an employer is found to have discriminated in jobs under Title VII warrant the cutting off of any federal financial assistance he is receiving under Title VI?

A. No. . . . The mere fact that an aid recipient violated Title VII would not itself warrant the termination of aid. Moreover, the agency administering the aid would not adopt a nondiscrimination in employment provision in connection with

> its aid program unless assistance to employment was one of the purposes of the program.

See "Memorandum, Proposed Civil Rights Act of 1964--H.R. 7152" Feb. 1964, at 47, cited in Kuhn, "Title IX: Employment and Athletics Are Outside HEW's Jurisdiction," 65 Geo. L.J. 49 at 52-53 (1976).

As Attorney General Kennedy explained, "Title VI is limited in application to instances of discrimination against beneficiaries of Federal assistance programs, as the language of § 601 clearly indicates." (emphasis added) 110 Cong. Rec. 10076 (1964).

Similarly, Congressman Celler, Chairman of the House Rules Committee and House Floor Manager for the bill, specifically agreed that Title VI "applies only to the policy of the management

of the school as far as students are concerned" and that discrimination against an applicant for employment in connection with a federally assisted program "has nothing to do with title 6. That would come under FEPC." Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules, 88th Cong., 2d Sess. at 198 (1964).

Despite these clear indications that Title VII, and not Title VI, covered employment, some members of Congress wanted the statute to clarify the intended scope of § 601. As such, § 604, which explicitly stated the intended scope of § 601, was added to Title VI. See Romeo I, supra, 438 F. Supp. at 1031, n.14. Section 604, 42 U.S.C. § 2000d-3, provides that "[n]othing contained in

this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment."

However, as the above-quoted comments of the Justice Department and legislative leaders so plainly show, the intent of § 604 was not to diminish the scope of what would otherwise have been covered. To the contrary, in the words of Senator Humphrey, the Senate floor leader, "we have expressed in specific legislative language what has always been intended.", 110 Cong. Rec. 12707 (1964), and, similarly, "[w]e have made no change

in substance in title VI . . . . We have modified the language to make explicit the declared intention of this title." 110 Cong. Rec. 12715 (1964).

Supporting this is the decision in United States v. Jefferson County Board of Education, 372 F.2d 836, 882-883 (5th Cir. 1966), aff'd en banc, 380 F.2d 385, cert. denied, 389 U.S. 840 (1967), which quotes the statements of Senator Humphrey and Attorney General Kennedy, and notes that in enacting Title VI, "Congress did not, of course, intend to provide a forum for the relief of individual teachers who might be discriminatorily discharged . . ." and that under § 601, "it is the school children, not the teachers (employees), who are the primary beneficiaries of federal

assistance to public schools."[8] 372 F.2d at 882-883.

The legislative history thus shows that even before § 604 was added to Title VI, Attorney General Robert Kennedy, floor leaders Hubert Humphrey and Emanuel Celler, and others, agreed that the language of § 601 was clear; it was not intended to cover employment per se. The courts recognized this and construed Title VI accordingly.[9]

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[8] In Jefferson County, the court also held that since § 601 of Title VI was designed to protect students, where faculty desegregation was necessary to a proper student desegregation plan, it was a proper subject of jurisdiction under § 601. See Point I(B) infra.

[9] In fact, even the Second Circuit has construed Title VI as not covering employment except with respect to "federal funds aimed primarily at providing employment." Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 25 FEP Cases 1013, 1028 (2d Cir. 1981).

c. The view that the language of §§ 601 and 901 does not cover employment reflects the plain meaning of such language.

Consistent with the views expressed by the Attorney General and the floor leaders concerning the meaning of the language used in § 601 (and later § 901), every court which faced the issue of the scope of § 901 prior to the Second Circuit found that the language of § 901(a) does not include employees per se within its terms. This reflects the fact that the language of § 901(a), 20 U.S.C. § 1681(a),

> on its face, is aimed at the beneficiaries of the federal monies, i.e., either students attending institutions receiving federal funds or teachers engaged in special research

> being funded by the United States government. The section does not include employees within its terms.

Islesboro II, supra, 593 F.2d at 426 (emphasis added). Accord, e.g., Junior College II, supra, 597 F.2d at 121 ("The First Circuit accurately noted that the plain language of section 1681(a) does not include employment discrimination . . ."); Romeo II, supra, 600 F.2d at 584 ("We find HEW's construction of Title IX [to cover employment] to be strained").

In addition, this same Title VI language, as incorporated in § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 has led the courts to conclude that employment per se was not covered in § 504. United States v. Cabrini Medical Center, 639 F.2d 908 (2d Cir.

1981); Simpson v. Reynolds Metals Company, Inc., 629 F.2d 1226 (7th Cir. 1980); Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8th Cir.), cert. denied, 101 S. Ct. 249 (1980); Trageser v. Libbie Rehabilitation, Inc., 590 F.2d 87 (4th Cir. 1978); Brinkley v. Department of Public Safety, 22 FEP Cases 164 (N.D. Ga. 1980); Silverstein v. Sisters of Charity, 38 Colo. App. 286, 559 P.2d 716 (1976); Zorick v. Tynes, 372 So.2d 133 (Fla. App. 1979); but see, Hart v. County of Alameda, 485 F. Supp. 66 (N.D. Cal. 1979).

Indeed it is ironic that the Second Circuit found employment covered under § 901 of Title IX, but not covered under § 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. § 794 (hereinafter "§ 504") which incorporates Title VI by reference, since, as the court

suggested in Simpson v. Reynolds Metals Company, Inc., supra, 629 F.2d at 1236, n.18, it would appear that the non-coverage of employment is even clearer under Title IX because:

> § 901 applies to "education program[s] or activit[ies] receiving Federal financial assistance," and the majority of the exceptions to § 901 specifically refer to activities relating to students. At the time it was adopted, Congress also removed the exemption for educational institutions from Title VII, see Act of March 24, 1972, Pub. L. 92-261, § 3, 86 Stat. 103 (1972), and other related statutes intended to remedy private employment discrimination.

629 F.2d at 1236, n.18. (emphasis in original).

While employment was not intended to be covered under § 901, it was nevertheless necessary that the language be broad, in view of the wide variety of beneficiaries and the many forms which sex discrimination might take. As the court stated in Romeo I, supra, 438 F. Supp. at 1032:

> The beneficiaries of Romeo's Title I remedial reading programs are the schoolchildren in those programs. The participants in Romeo's vocational education programs are the students learning new vocations through them. The beneficiaries of Romeo's School Lunch program are the disadvantaged children who receive free milk as a result of this federal assistance. Section 1681 was written in broad terms not to cover all forms of sex discrimination in

> education, but only to cover the wide variety of education programs funded by the federal government and the many ways in which sex discrimination against students in those programs can be manifested. (emphasis added)

As passed, the language of § 901 is inappropriate when applied to teachers, school secretaries, or cafeteria workers:

> Teachers participate in these programs only to the extent that they may teach and help administer some of them; teachers benefit from these programs only to the extent that the funds for them may be used to pay their salaries; teachers are "subjected to discrimination under" these programs, (emphasis added), only to the extent that the programs themselves

> may be established and operated in an employment-related discriminatory way. Teachers, in short, are hard pressed to fit themselves within the plain meaning of § 1681's prohibitory language, general as it may appear on its face. When Congress means to statutorily regulate employment discrimination, it uniformly does so in more explicit terms than this.

Romeo I, supra at 1031-32.

Hence this language must be read as covering the wide range of beneficiaries of federally funded programs, and not employees.

d. The exemptions and qualifications of § 901 are directed at students, not teachers.

Section 901 engrafts upon the language of § 601 a long series of exemptions and qualifications all of which

relate to sex discrimination with respect to students and none of which relates to teachers, custodians, secretaries and other board employees. This confirms that § 901 is directed at students, not teachers.

For example, exemptions 1, 2 and 5 address the admissions policies of educational institutions. Exemptions 3 and 4 entirely exempt religious and military institutions, and exemptions 6, 7, 8 and 9 exempt student activities such as fraternities or sororities, boy and girl conferences, beauty pageants and father-son or mother-daughter activities. Thus, Congress has very closely addressed the student relationship with educational institutions, setting narrow parameters around what was covered by § 901. At the same time, none of the exemptions

addresses the relationship of employees of educational institutions.

It strains credibility that Congress would so narrowly define the student relationship while leaving the employment relationship wide open. A similar problem arises if the exemptions of § 901 apply to employment. It is difficult to believe, for example, that Congress intended to exempt employment in the context of military academies to allow such an institution to discriminate against females in secretarial or cafeteria positions.

When Congress has addressed the employment relationship, it has included appropriate exceptions. See, for example, the bona fide occupational qualification exemption to Title VII, 42 U.S.C. § 2000e-2 and the exemption

for employment of aliens in 42 U.S.C. § 2000e-1.

HEW argues that the absence of any mention of employment in the § 901 exclusions signifies an intent to cover employment under that section without exceptions.[10] The Senate version of Title IX did contain an exception for employment which related to the proposed amendments to Title VII--but not § 901--for "employment of individuals of a particular religion to perform work connected with the carrying on by such institution of its religious activities." Conference Report No. 798, [1972] U.S. Code Cong. & Ad. News 2608 at 2672.

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[10] In reality even HEW recognized that it made no sense to permit no exceptions in the area of employment, and so, in proceeding with Subpart E, HEW simply added a BFOQ exemption by regulation. 45 C.F.R. § 86.61, 34 C.F.R. § 106.61.

This is further evidence that § 901 and its exceptions are directed at students--not employees.

Thus, as the Sixth Circuit expressed it in Romeo II, supra, 600 F.2d at 584:

> An examination of these provisions [the exceptions in § 901] discloses that each exception relates to students, student bodies, or participants in programs. They are not concerned with teachers or staff. It may be fairly assumed that the exceptions relate to students because students are the subject of § 1681; that is, the exceptions deal with the same subject matter as that covered generally by the preceding language.

Islesboro I, supra, 449 F. Supp. at 870; Romeo I, supra, 438 F. Supp. at 1031-32.

Similarly, after the exceptions in Subsection (a), there appears a Subsection (b) of § 901 which qualifies the scope of § 901, but which, like the exceptions listed in Subsection (a), is directed at students. Specifically, Subsection (b) provides that nothing contained in Subsection (a) shall require

> preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity . . .

Again, this language is clearly directed at students, not employees.

Thus, the exemptions and qualifications of § 901 are not directed to employment and in this way indicate

that § 901 itself is not directed to employment.

2. The deletion of "§ 904" was necessary to avoid inconsistency and had no effect on the established meaning of § 901.

As originally passed by the House, Title IX did include "§ 904," paralleling the clarification language of § 604, restating that § 901 did not authorize agency action in the area of employment discrimination.

However, there were specific provisions in Title IX which addressed the employment relationship (i.e., the amendment to Title VII and the Equal Pay Act) as was not the case with the revised Title VI. The inclusion of § 904 would have been inconsistent with those provisions. Hence, § 904 was deleted in the House-Senate Conference Committee.

(See Romeo II, supra, 600 F.2d at 584; Islesboro II, supra, 593 F.2d at 428).

This explanation for the deletion of § 904 has been recognized by all courts which have addressed the issue except the court below. See, e.g., Islesboro II, which stated: "The above-cited section [904] would have been inconsistent with other sections of the Act then being enacted, namely the amendments to Title VII and the Equal Pay Act . . . ." 593 F.2d at 428.

That this deletion of § 904 was made to remedy a drafting mistake is further clarified by the comments of Representative O'Hara during the hearings on the Title IX regulations when he stated:

> The staff was given overnight to draft this whole thing [Title IX] and they goofed, 904 got in there by mistake. It

> was a cut and paste job. There was a Xerox of [Title VI] the Civil Rights Act [of 1964] that they just pasted in.
>
> Then when we got around to straightening things out in conference we improved the drafting and dropped it out.
>
> Now, great significance is being given to the fact that it was dropped out. It was dropped out because it got in through a drafting error. So the quiet, easy way to get it out was to slide it out somewhere along the line without having to go through a long explanation of how it got in. So much for that part of the argument. (emphasis added)

Review Hearings, supra, at 409.

Since the court below was heavily influenced by its inability to find "language anywhere in the legislative

history that even suggests that the conference committee deleted the provision merely for the sake of consistency," North Haven, supra, 629 F.2d at 783, this statement from Chairman O'Hara drastically undermines that decision[11] and points inescapably to the fact that § 904 was dropped because of the inherent inconsistency with §§ 906 and 908.[12]

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[11] While "[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," United States v. Price, 361 U.S. 304, 313 (1960), the remarks of Congressman O'Hara are not relating a personal post-passage interpretation of a statute, but are describing mechanical events which occurred during the drafting of the House version of Title IX, a description which is confirmed by the committee minutes which were prepared at the time of the events referred to by Congressman O'Hara. See Minutes of the House Comm. on Education and Labor, at 9 (Sept. 30, 1971), cited at Kuhn, supra, 65 Geo. L.J. at 57, n.44.

[12] The Second Circuit in its opinion also argued that Congress "could easily have

Hence, there is no basis for concluding that the deletion of "§ 904" affected the established meaning of the language used in § 901.[13]

footnote 12 continued

drafted an employment exclusion applicable solely to the first portion of the Act." 629 F.2d at 783. This is obviously circular reasoning, as it assumes that an exclusion was necessary to avoid coverage of employment by § 901. The legislative history of Title VI and the plain meaning of the § 601 language as clarified by the § 901 exceptions and the separate provisions covering employment, make clear that this § 601 language was not intended to cover employment and hence no § 604 equivalent was needed.

Moreover, unlike § 601, § 901 is limited to education programs. It would not cover employment programs. See Simpson v. Reynolds Metals Company, Inc., supra, 629 F.2d at 1236, n.18. The "§ 904" language would have excluded coverage of employment except "where a primary objective of the federal financial assistance is to provide employment." Arguably, then, this § 904 language might have extended § 901 to cover such employment programs and hence was better omitted.

[13]The cases dealing with a claimed right of action for handicapped employment

footnote 13 continued

discrimination under § 504 also support the proposition that, without regard to the § 604 language, § 601 is not directed at employment. The § 604 language is incorporated by reference by § 504, relating to handicapped discrimination. Section 604, on its face applies only to "department or agency" action and hence it was argued in the handicapped discrimination cases that, due to the inapplicability to private suits of this § 604 exclusion of employment coverage, private handicapped employment suits are authorized. In Carmi v. Metropolitan St. Louis Sewer District, supra, 620 F.2d at 674, the court rejected this argument, concluding that "Congress did not intend to extend protection under Title VI to any person other than an intended beneficiary of federal financial assistance." See also Carmi, supra, 620 F.2d at 674-675, n.4, citing extensive legislative history to this effect and citing Jefferson County for the proposition that § 604 was merely intended to "make . . . clear" the intended coverage of Title VI. See also a similar discussion of the legislative history of Title VI in Simpson v. Reynolds Metals Company, Inc. supra, 629 F.2d at 1236, n.18.

3. In enacting Title IX, Congress rejected efforts to change § 901 to include coverage for general employment discrimination and instead covered beneficiaries under § 901 and employees under §§ 906 and 908 amending Title VII and the Equal Pay Act.

Other strong evidence supporting petitioners' contention that § 901 was not intended to cover employment by inference is the congressional failure to adopt the Justice Department proposal to do so expressly.

Title IX grew out of hearings held by the House of Representatives in 1970. See Cannon, supra, 441 U.S. at 694, n.16. At that time, representatives of the Justice Department opposed the present language of § 901 and proposed alternative language which the Department said "would extend not only to discrimination against students and other beneficiaries of the Federal Grants, but

also to employment discrimination." Discrimination Against Women: Hearings Before the Special Subcomm. on Education of the Committee on Education and Labor, 91st Cong., 2d Sess., Part 2 (1970) at 678 (hereinafter "Discrimination Hearings").

This proposal would have placed jurisdiction over employment discrimination by educational institutions under HEW rather than under the existing EEOC and Labor Department mechanisms, as was the case under Title IX as ultimately enacted. The Department's proposal included language virtually identical to that which became § 901(a), as well as a separate paragraph (b) which prohibited employment discrimination by an educational institution as follows:

> Sec. 2. (a) No person in the United States shall, on the ground of sex, be

excluded from participation in, denied the benefits of, or subjected to discrimination under, any education program or activity receiving Federal financial assistance, except where sex is a bona fide ground for differential treatment.

(b) No recipient of Federal financial assistance for an education program or activity shall, because of an individual's sex,

(1) fail or refuse to hire (except in instances where sex is a bona fide occupational qualification) or discharge that individual, or otherwise discriminate against him or her with respect to compensation, terms, conditions, or privileges of employment; or

(2) limit, segregate, or classify

> employees in any way which would deprive or tend to deprive that individual of employment opportunities or otherwise adversely affect his or her status as an employee.

Discrimination Hearings, supra, at 690-691 (emphasis added). This proposal reflected the Justice Department's consistent interpretation of the language in § 601 of Title VI and § 901 of Title IX as not including coverage of employment. Hence, if employment was to be covered, there existed a need for an additional subsection (b).

However, there was little support voiced for the Justice Department proposal, which would have put employment under HEW by including it in what became § 901. Instead the witnesses testifying on the subject of employment

discrimination did so with reference to the provisions amending Title VII and the Equal Pay Act. See Discrimination Hearings, supra, at 8-9, 26-27, 79, 128, 159, 379, 453. Moreover, the statement of Bernice Sandler, later a strong advocate of HEW's effort to regulate sex discrimination in employment, discussed only the proposed amendments to Title VII and the Equal Pay Act in relation to ending discrimination against female faculty members, while she confined her comments in regard to the proposal to amend Title VI to matters involving discrimination against students. Id. at 304-306.

Hence, the Justice Department proposal was abandoned and, reflecting the comments of other witnesses, §§ 906 and 908 accomplished the objective of these proposals by amending Title VII to remove the exemption for educational

institutions and amending the Equal Pay Act.[14]

4. Senator Bayh's floor remarks support petitioners' position that § 901 was intended only to cover beneficiaries.

Also confirming this analysis are the floor remarks of Senator Bayh which, taken as a whole, support the proposition that what became § 901 was to be construed in the same way as § 601, that only beneficiaries of federal aid are covered by § 901 and that employment is covered by the amendments to Title VII and the Equal Pay Act.

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[14]Senator McGovern also offered a version of what became § 901, which expressly covered employment, but which was not adopted. This provided that:

> no person in the United States shall be excluded on the grounds of sex from participation in, be denied the benefits

For example, on August 5, 1971, Senator Bayh introduced an amendment to a pending higher education bill. After a general opening statement, Senator Bayh set forth a specific description of § 601 of his proposal (the predecessor of § 901). In this description he said nothing about employment--instead he stated that "Section 601 expressly prohibits discrimination on account of sex--including the denial of admission or benefits." Further, as noted in Cannon, supra, 441 U.S. at 694, n.16, he stated that "[t]hese provisions are identical to

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footnote 14 continued

> of, be subjected to discrimination under or be denied employment in connection with any program or activity assisted under this Act.

117 Cong. Rec. 30411 (1971) (emphasis added).

those provided under Title VI of the 1964 Civil Rights Act." 117 Cong. Rec. 30156 (1971) (emphasis added).

This point was emphasized again in remarks made by Senator Bayh, which also were cited in part by this Court in Cannon, supra, 441 U.S. at 694, n.16.

> I might point out that, so far as involvement or supervision by the Secretary of HEW is concerned, we really are not doing anything to the private school that is not now in the law under title VI of the 1964 civil rights Act, relating to discrimination in other areas.
>
> We are saying that the power which now resides in the Federal Government over private institutions shall be extended. We are

> only adding the 3-letter word "sex" to existing law.

117 Cong. Rec. 30408 (1971) (emphasis added).

Similarly, Senator Bayh's remarks of February 28, 1972, when he reintroduced his amendment, indicate a decision to leave jurisdiction over employment discrimination to the EEOC and the Labor Department rather than give jurisdiction to yet another federal bureaucracy in HEW to regulate employment discrimination. Specifically, Senator Bayh labeled the first portion of his floor statement "A. Prohibition of Sex Discrimination in Federally Funded Education Programs." He explained that:

> Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title

> VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI.

118 Cong. Rec. 5807 (1972) (emphasis added).

Then, in a separate section of this statement, Senator Bayh discussed changes in Title VII and the Equal Pay Act under the heading "B. Prohibition of Education-Related Employment Discrimination."

A similar breakdown exists in the relevant section of the House Report, H. Rep. No. 554, 92d Cong. 1st Sess. (1971), reprinted in [1972] U.S. Code Cong. & Ad. News 2462, 2511-12, again

indicating a recognition that employment discrimination is dealt with separately. The Report first discusses the problems: in the first paragraph, problems in admissions, and in the second paragraph, problems "at the faculty level." The Report then goes on, in parallel fashion, to discuss the solutions: the third paragraph discusses the prohibition of "discrimination in any education program or activity" and its application to the admissions problem. Then, noting that "[t]he title also contains provisions to deal with discrimination in related areas," e.g., employment, the Report discusses the amendments to Title VII and the Equal Pay Act in the remaining paragraphs.

As the First Circuit Court of Appeals noted in Islesboro II in reference to Senator Bayh's statement:

> This breakdown demonstrates that the basic provisions dealing with admissions and services at educational institutions, now embodied in Title IX, were separate and distinct from the provisions amending Title VII and the Equal Pay Act, both of which dealt with employment.

593 F.2d at 428.

Despite this clear indication from Sen. Bayh that § 901 covered beneficiaries, that it is "identical to" § 601 of Title VI and that employment is covered under other provisions, HEW has focused its attention on a few selected and imprecise floor statements of Sen. Bayh, lifted out of context, and has proceeded to use these statements as a basic underpinning of its arguments.

For example, in connection with Sen. Bayh's floor statement containing the breakdown just referred to, the appeals court, adopting HEW's arguments, ignored the hundreds of words in Subsection A which were directed at problems relating to discrimination against students. Instead, it focused on the six words which mentioned employment, where Senator Bayh stated that "this portion" of his amendment [§ 1001-1005] covered, inter alia, "employment practices for faculty and administrators."

In addition to the anomaly that employment is not otherwise mentioned in Senator Bayh's long discussion in section A of his statement, his brief remarks concerning employment do not support HEW's position, because, as even the Second Circuit admitted, "[t]here is some

discrepancy" in the statement of Senator Bayh for which Senator Bayh was guilty of an "oversight." 629 F.2d at 781, n.11. This is because Subsection A of Senator Bayh's remarks starts with the statement that "[c]entral to my amendment are sections 1001-1005" and § 1005 was the proposal to amend Title VII. Hence, the statement that "this portion" of Senator Bayh's amendment covered some employment does not necessarily mean that § 1001, the predecessor of § 901, covers employment. Rather, if not itself an "oversight," this statement reflects the fact that § 1005 amended Title VII and therefore it, rather than § 1001, covered employment. This statement also could refer to possible limited coverage

under § 901 of employment actions affecting beneficiaries of federal education aid.[15]

Suprisingly, this statement in the midst of "discrepancy" and "oversight" is regarded by HEW as the "clearest expression of the intent of the amendment . . . . "Petition for a Writ of Certiorari United States Department of Education v. Seattle University, No. 80-493, p. 16. In view of this, it is not surprising that the other comments by Senator Bayh relied on by the Second Circuit Court of Appeals, 629 F.2d at 779-782, are even more elliptical. They also are taken out

[15] Immediately after the sentence containing the six words referring to employment, Senator Bayh refers to how the provisions "have been tested under title VI of the 1964 Civil Rights Act," which admittedly did not cover general employment practices. 118 Cong. Rec. 5807 (1972).

of context, and reflect imprecision on Sen. Bayh's part, and would not appear to be inconsistent with his frequent emphasis that § 901 of Title IX is identical to Title VI and that employment is covered by amendments to Title VII and the Equal Pay Act.[16]

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[16] For example, at 118 Cong. Rec. 5803 (1972), in close proximity to an earlier remark describing § 901 as the "heart of this amendment", Senator Bayh states that the "amendment" covers, inter alia, " . . . faculty employment, with limited exceptions." Due to the sequence and proximity of these remarks, HEW asserts that the reference to "faculty" must be in relation to § 901. Yet, the use of the word "amendment" - which Bayh used elsewhere to describe the whole of Title IX (i.e. "Amendment 874") - makes it questionable to ascribe the "faculty" coverage remark to any particular section of Title IX, and is in no way inconsistent with the position that the "faculty" were covered by Title VII and the Equal Pay Act.

Later, at 118 Cong. Rec. 5812-5813 (1972), Senator Bayh answers several of

footnote 16 continued

Senator Pell's questions concerning Title IX's coverage. This colloquy commences with questions by Senator Pell about the exceptions to § 901's coverage of admissions, which Senator Bayh answers in one sentence, followed by a generalized discussion of the types of discrimination covered by Title IX. Thus, Senator Bayh was clearly not confining his answers to the topics of Senator Pell's questions.

HEW nevertheless argues that Senator Bayh's later references to the military and parochial school exemptions in response to Senator Pell's questions about quotas and female teachers at such schools clearly imply an understanding that the exceptions to § 901 relate at least in part to employment. HEW attempts to use that exchange as support for its conclusion that § 901 itself covers employment. See 118 Cong. Rec. 5812, 5813 (1972).

While, as noted earlier, Senator Bayh's answers do not merely respond to Senator Pell's questions, but digress, if Senator Bayh's remarks were as precise as HEW contends, then they would contradict each other, since Senator Bayh stated flatly near the beginning of the colloquy that "[i]n the area of employment, we permit no exceptions." 118 Cong. Rec. 5812 (1972), while also stating that there are exemptions for teachers in certain situations.

Hence, as the First Circuit Court of Appeals stated:

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footnote 16 continued

> The Islesboro II court and other courts have examined this passage and accurately termed the remarks upon which HEW relies "the product of the imprecision of oral discussion." 593 F.2d at 428.
>
> An illustration of the out of context problem is the Second Circuit's reliance on two passing references to employment in Senator Bayh's introductory remarks of February 5, 1971, which Senator Bayh made in the context of a statement that "[t]he antidiscrimination provisions of the Civil Rights Act of 1964 do not deal with sex discrimination by our institutions of higher learning", 117 Cong. Rec. 30157 (1971). Though relying on this passage, the court does not refer to Senator Bayh's specific description of § 601, quoted above, as dealing with beneficiaries, does not refer to the fact that this broad focus tied in to a task force report which Senator Bayh inserted into the Congressional Record at that time, 117 Cong. Rec. 30157-30158 (1971), and does not refer to the fact that he went out of his way at that time to say that his proposal was identical to Title VI. 117 Cong. Rec. 30156 (1971).

> While it is true that there were occasional lapses during the discussions, wherein one of the senators would telescope the sections, thereby suggesting that employment was to be covered under the basic provisions of Title IX, a careful examination of the debates has led us to conclude that these were the product of the imprecision of oral discussion rather than a reflection that the Act intended section 901 of Title IX to embrace prohibitions against sex discrimination in employment. This was reserved for the amended Title VII and the Equal Pay Act.

Islesboro II, supra, 593 F.2d at 428 (emphasis added).

At the very least, it was totally unjustified for the court to overlook the numerous statements of Senator Bayh that § 901 was "identical"

to § 601 and then give substantial weight to selected portions of Senator Bayh's remarks on the Senate floor, which refer ambiguously to employment coverage, and for the court to assume that any such coverage was broader than under Title VI. As this Court has recently stated, "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979); accord, Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980).[17] This is especially so here where so many other courts have read

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[17] The Second Circuit Court of Appeals also cited the legislative "history" after the passage of Title IX, noting that Congress did not disapprove the regulations and that later attempts to limit the scope of Section 901 had failed. Under 20 U.S.C. § 1232, Congress has only forty-five days to reject regulations; therefore, all that it took to prevent disapproval of the Title IX regulations, which were being

footnote 17 continued

attacked in toto, was a series of procedural maneuvers which prevented a timely floor vote in either house. See Comment: "HEW's Regulations Under Title IX of the Education Amendment of 1972: Ultra Vires Challenge", 1976 Brigham Young U. L. Rev. 133, at 156 (1976) (hereinafter "Ultra Vires"). Little if any weight can be given such history. "Congressional inaction frequently betokens unawareness, preoccupation or paralysis." Zuber v. Allen, 396 U.S. 168, 185, n.21 (1969). Further, as this Court has stated in United States v. Price, 361 U.S. 304, 313 (1960): "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." Accord, International Brotherhood of Teamsters v. United States, 431 U.S. 324, 354, n.39 (1977); County of Washington v. Gunther, 49 U.S.L.W. 4623, 4627, n.16 (1981). This is especially true when there is a mere failure to act. Because of this, in 1975, just after it failed to disapprove these regulations, Congress enacted legislation to ensure that courts would not draw an inference from Congress's failure to disapprove regulations. 20 U.S.C. § 1232(d)(1). This bill was pending before Congress at the same time as the Title IX regulations were before Congress. The Second Circuit, ignoring this instruction, proceeded to do so anyway.

these ambiguous remarks in a contrary manner.[18]

It is also significant that nowhere prior to enactment is there any statement by a legislator expressly contrasting § 901 of Title IX with § 601 of Title VI, indicating that Title IX covers employment and Title VI does not.

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[18] In rendering its opinion, the Second Circuit stated that it was "cognizant that four other courts of appeals and a number of district courts have held otherwise," 629 F.2d at 774, that "we are well aware of Justice Jackson's warning against selecting casual statements from floor debates, Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring)," 629 F.2d at 781 and that "Congressional inaction should not lightly be construed as approval," 629 F.2d at 784. Yet it proceeded to render an opinion contrary to the seventeen other decisions which had dealt with this question, based on the statements of Senator Bayh which HEW had taken out of context from his floor remarks and based on post-enactment inaction.

To the contrary, there was an express proposal by the Justice Department to cover employment under § 601. This approach, however, was not adopted. Congress chose instead to give jurisdiction over sex discrimination in employment to the existing EEOC and Labor Department mechanisms rather than to HEW.

Thus, the legislative history taken as a whole is clear that § 901 was intended to parallel § 601 and protect beneficiaries of federally funded programs, not employees of an educational institution.

B. The Subpart E Regulations Are Not Directed to Employment Discrimination Affecting Beneficiaries; Thus the Issue of Whether Certain Employment Practices Can Be Regulated on a Systemic Basis Where Such Practices Cause Sex Discrimination Against Students Is Not Before the Court.

HEW has argued that Subpart E

can be justified based on an "infection" theory found in some Title VI and fourteenth amendment racial desegregation cases, e.g., United States v. Jefferson County Board of Education, supra, 372 F.2d 836, which permitted desegregation orders regarding students to include provisions respecting the allocation of faculty. HEW has argued that the basis of these decisions is the recognition of the effect upon students of discrimination against faculty, which effect applies, it is contended, in cases of sex discrimination as well as cases of race discrimination.

Clearly, however, this argument is totally irrelevant here. HEW has not promulgated or proceeded under "infection" regulations. Rather, it has

promulgated Subpart E's broad-ranging regulations covering the entire field of employment-related sex discrimination, totally without regard to any effect on students. In contrast, HEW's regulations under Title VI, dealing with employment discrimination against non-beneficiaries of federal aid, at least contain a section explicitly setting forth a requirement of a nexus between the effect of employment practices on employees and the alleged "infection" of students. (See 45 C.F.R. Part 80.3(c)(3).)

As the Court noted in Islesboro II, supra, 593 F.2d at 430:

> While the basic premise [of the infection theory] might be correct, it does not adequately underpin a grant of authority to HEW to promulgate broad-ranging regulations

> canvassing employment-related discrimination.

Accord, Junior College II, 597 F.2d at 121, n.3; Romeo I, supra, 438 F. Supp. at 1035; Seattle University, supra, 621 F.2d at 994. See also University of Toledo, supra, 464 F. Supp. at 696.

Thus, the issue of whether infection regulations under Title IX might be valid if promulgated is irrelevant to this case.[19]

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[19] Although irrelevant here, there is a serious question as to the appropriateness of the "infection" theory in a Title IX individual discrimination context. HEW's infection cases involved racial desegregation remedies under Title VI and the Constitution, where provisions regarding faculty were necessary to accomplish an end to systemic racial discrimination against students. These cases do not support the use of Title VI as another Title VII type remedy for an individual case of employment discrimination. To the contrary, United States v. Jefferson County Board of Education, supra, 372 F.2d at 883, expressly states that

footnote 19 continued

"Congress did not, of course, intend to provide a forum for the relief of individual teachers who might be discriminatorily discharged. . . ."

Moreover, the one Title IX case cited in support of application of the infection theory to justify the instant regulations, Caulfield v. New York City Board of Education, 486 F. Supp. 862, 882-83 (E.D.N.Y. 1979), aff'd. 632 F.2d 999 (2d Cir. 1980), cert. denied, 101 S. Ct. 1739 (1981) actually supports petitioners' position. District Judge Weinstein (E.D.N.Y.) in Caulfield indicated agreement with the holdings of Romeo I and its progeny on the invalidity of Subpart E and proceedings under it. Id. at 882-883. While the court did not "suggest that the possible effect of sexually discriminatory school employment practices on students is as clear or severe as that of racially discriminatory practices," the court indicated that there was sufficient colorable basis for such claim of "infection" in some limited Title IX situations involving "systemic discrimination," so as to justify a voluntary settlement with the Department of Education by the New York City Board of Education. Id. at 885. Note also that the various infection cases cited in Caulfield, 486 F. Supp. at 880-881, all relate to systemic discrimination. Hence, as the court pointed out in Sabol v. Board of Education, 510

II. THE SUBPART E REGULATIONS ARE INVALID BECAUSE THEY ARE NOT PROGRAM SPECIFIC.

The Subpart E regulations are also invalid because they ignore the

footnote 19 continued

F. Supp. 892, 899 (D.N.J. 1980); citing Caulfield and Jefferson County:

> These cases clearly indicate that teacher discrimination is equivalent to discrimination against students only where broad policies of hiring and assignment are involved, not where a solitary case of employment discrimination occurs.

Similarly, it has been argued that there are a few limited circumstances where an employee is the primary beneficiary of a federal program who would be covered by Title IX, but, again, Subpart E is not directed at any such limited categories. Furthermore, § 901, unlike § 601, is applicable only to an "education program or activity". Section 901 would therefore appear to be inapplicable to programs designed to provide employment. See Simpson v. Reynolds Metals Company, Inc., supra, 629 F.2d at 1236, n.18.

restrictions in §§ 901-902. Section 901 pertains only to discrimination in an "educational program or activity receiving Federal financial assistance." Section 902 limits HEW's power under § 901 to the "particular program, or part thereof" in which discrimination is found, and also require that the regulations be directed to the federally funded programs.

The challenged regulations ignore these restrictions as they purport to regulate general employment practices in all programs "operated by a recipient which receives or benefits from Federal financial assistance" (see 34 C.F.R. § 106.51(a)), and in no way limit the scope of their coverage to discrimination in federally funded programs.

A. The Program Specific Language of § 901, Similar to the Program Specific Language of § 601, Limits HEW's Jurisdiction to Those Programs Which Receive Federal Financial Assistance.

The language of § 901 prohibits discrimination in "any education program or activity receiving Federal financial assistance." This prohibition, commonly characterized as "program specific," is quite different from, and is a severe restriction of, the original Senate version of Title IX which would have covered discrimination not on a program specific basis but on an institution wide basis, i.e., over the entire spectrum of education programs at an institution with no narrow limitations to the program actually receiving federal money.

The early version provided that:

> No person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of or be subject to discrimination under any program or activity conducted by a public institution . . . which is a recipient of Federal financial assistance for any education program or activity . . .

117 Cong. Rec. 30156 (1971) (emphasis added).

Thus, this original version provided that a school district that discriminated in any program or activity could lose all federal funds regardless of whether federal assistance was involved in the offending program.

However, the version of the bill ultimately adopted by Congress limits fund termination to the particular

program receiving federal financial assistance. If boys are illegally denied access to a home economics program receiving federal assistance, funds can only be terminated to that program and not, for example, to a federally funded vocational training or special education program.

In contrast, § 604 of Title IX, as enacted, 20 U.S.C. § 1684, relating to discrimination against blind people, adopted this "institutional," non-program specific approach.[20] Hence, there

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[20] Section 904 of Title IX provides that "[n]o person in the United States shall, on the grounds of blindness or impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity." (emphasis added) Section 904 of Title IX as enacted is not to be confused with the proposed § 904 which would have excluded employment using language similar to § 604 of Title VI.

can be no doubt that "Congress was aware of the distinction between the concept of an institutional approach" and the concept of a "programmatic approach." See, Othen v. Ann Arbor School Board, 507 F. Supp. 1376, 1382 (E.D. Mich. 1981).

In light of all of this, it is clear that the words "program or activity" appearing in § 901 do not mean "institution" or "school district."

Title VI's program specific limitations were aptly described by the Fifth Circuit Court of Appeals in Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068, 1078 (5th Cir. 1969), when it said:

> Congress did not intend that such a program suffer for the sins of others. HEW was denied the right to condemn programs by association. The statute

> prescribes a policy of disassociation of programs in the fact finding process. (emphasis added)

Thus, Title IX prohibits discrimination in any federally funded education program or activity. It does not cover the portion of petitioners' education programs and activities which do not receive federal assistance. By attempting to subject all programs of an institution, whether federally funded or not, educational or not, to HEW regulations if any one program receives federal financial assistance, the regulations improperly exceed the authorizing statute. See Ultra Vires, supra, 1976 Brigham Young U. L. Rev. at 152.

B. Section 902, the "Pinpoint" Termination Provision, Confirms the Program Specific Scope of Section 901.

The first Bayh version of Title IX contained compliance language virtually identical to what was ultimately enacted. However, it did not contain the "pinpoint" termination provision, found in § 902 of Title IX and § 602 of Title VI, which limits any termination of federal assistance to the "particular program, or part thereof," in which discrimination is found.

The genesis of Title IX's pinpoint termination provision is found in the legislative history of the identical provision contained in Title VI. As the 1964 Civil Rights Act worked its way through the House and Senate, prior to the insertion of the pinpoint language, the question frequently arose as to whether assistance to one program

could be cut off because of a finding of discrimination in another program. The consistent answer was "no." See, e.g., Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary, ser. 4, pt. II, at 1542-1543, 88th Cong., 1st Sess. (1963) (colloquy between Rep. Meader and HEW Secretary Celebrezze that the withholding of funds from one program cannot be used as a means of combatting discrimination in another program).

The Justice Department agreed that aid would be cut off "just from the particular program where the discrimination exists." Civil Rights: Hearings Before the House Comm. on the Judiciary, ser. 4, pt. IV, at 2766, 88th Cong., 1st Sess. (1963). The Attorney General further indicated that not only must

the termination of assistance be limited to the particular program where the discrimination is found, it must also be limited to the particular location, i.e., the school or schools within a district, where the discrimination exists. Id. During floor debate, Representative Mathias called his colleagues' attention to the Attorney General's assurance that any termination of assistance would be "as specific and particular as it possibly could be" and he noted that "this was certainly the understanding of the members of the committee in working on the bill." 110 Cong. Rec. 2486 (1964).

The Senate floor leader for Title VI emphasized that "participation in one program would not justify the exaction of a non-discrimination assurance concerning some other program." 110

Cong. Rec. 7059 (1964) (remarks of Senator Pastore). Senator Ribicoff, one of the two authors of the version of Title VI passed by the House, pointed out that discrimination in one program would not justify any action with respect to any other program. Id.

The repeated assurances by the civil rights leadership that assistance to one program could not be terminated because of a finding of discrimination in another program were made prior to the inclusion in Title VI of the so-called "pinpoint" termination provision. When the final version of the Civil Rights Act was proposed, the new Title VI included the pinpoint provision. It was pointed out on the floor of the Senate that:

> The new language will ensure that Federal funds will be cut off

> for only those political entities or particular programs or parts of programs in which discrimination is practiced.

110 Cong. Rec. 12689 (1964) (remarks of Senator Saltonstall). The floor leader for the Civil Rights Act also explained to his colleagues that the revisions clarified the intent that any "[t]ermination shall affect only the particular program, or part thereof," in which a violation occurs. 110 Cong. Rec. 12715 (1964) (remarks of Senator Humphrey).

When House Judiciary Committee Chairman Celler appeared before the House Rules Committee to describe the Senate amendments to the bill, he said:

> [T]he Senate amendment makes clear that Federal funds will be cut off for only those political

> entities or particular programs or parts of programs in which discrimination is practiced. This means that all . . . aid to a particular program, will not be cut off because one particular part of the program or institution is being operated in violation of the law.

Civil Rights: Hearing Before the House Comm. on Rules, 88th Cong., 2d Sess. at 6 (1964) (emphasis added).

The legislative history reinforces, therefore, what the very language of the statute itself makes clear: federal assistance to program "A" cannot be terminated because of a finding of discrimination in program "B." Thus, it is unlikely in the extreme that Congress intended by § 901 to protect all of plaintiff's employees in every program, when the remedies provided by § 902 are

limited to the one or more federally assisted programs in which discrimination is shown to exist. Under HEW's Title IX regulations, a school district which discriminates in any employment practice, in any program, whether federal assistance is involved or not, could lose all federal aid.

C. Section 902 Expressly Limits Rule Making Authority To Federally Funded Programs.

In addition to the pinpoint termination language, a second part of § 902 specifically requires that regulations under Title IX be limited to federally funded programs.

In its decision, the Second Circuit overlooked this provision, stating that:

> [w]e disagree with the court below and the district court

> in Romeo Community Schools, supra, 438 F. Supp. at 1033, that this limitation [on the right to terminate funds] 'is implicitly a limitation on HEW's authority to regulate as well.' Such a construction is contrary to the judicial approval given to broad HEW guidelines under Title VI of the Civil Rights Act of 1964, which also contains this language limiting fund termination. See United States v. Jefferson County Board of Education, 372 F.2d 836, 847-61 (5th Cir. 1966), adopted en banc per curiam, 380 F.2d 385, cert. denied, 389 U.S. 840 (1967).

629 F.2d at 785.

However, this reliance on the Fifth Circuit was clearly misplaced, as is indicated by the decision of the Fifth Circuit Court of Appeals in Dougherty II,

handed down a few days after the Second Circuit decision.

As the Dougherty II decision explained, there is in fact a specific requirement in § 902 that HEW's regulations be directed to programs and activities:

> Section 1682 states that a department is authorized "to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 20 U.S.C. § 1682 (emphasis added). Further evidence that the regulations must be keyed to a specific

> program is found in the enforcement provisions. Section 1682 states that termination or refusal of federal funds "shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found." 20 U.S.C. § 1682 (emphasis added).

Dougherty II, supra, 622 F.2d at 737 (emphasis in original). Thus, the opinion in Dougherty II shows that the Second Circuit erred when it relied on the earlier opinion of the Fifth Circuit in Jefferson County and said that there was "[n]othing in § 902 [which] requires HEW only to issue regulations directed at specific programs." 629 F.2d at 785. See also Board of Public Instruction of Taylor County, Florida v. Finch, supra, 414 F.2d 1068 (5th Cir. 1969)

(Title VI of the Civil Rights Act must be administered on a program-by-program basis); Ultra Vires, supra, 1976 Brigham Young U. L. Rev. at 179.

Further, the Second Circuit overlooked the fact that § 901 itself is limited to discrimination in an "education program or activity receiving Federal financial assistance" and that Senator Bayh's broader proposal which would have covered all programs of institutions receiving federal funds was not adopted.

Hence, as the Court said in Dougherty II, supra, "the Secretary exceeded his authority by enacting general regulations prohibiting sex discrimination in employment without limiting their effect to specific programs that received

federal financial assistance." 622 F.2d at 738.

III. THE FEDERAL GOVERNMENT AND INDIVIDUAL EMPLOYEES HAVE OTHER MEANS TO REMEDY EMPLOYMENT DISCRIMINATION BY EDUCATIONAL INSTITUTIONS.

Title VII and the Equal Pay Act serve to make employees who have been discriminated against on the basis of sex "whole" for any discrimination they might have suffered. There is no need for yet another government agency to have jurisdiction over employment discrimination.

In extending the jurisdiction of the EEOC and the Secretary of Labor to cover employment discrimination in educational institutions on the basis of sex, rather than giving that jurisdiction to HEW, Congress recognized the expertise of these agencies in this area. As the

court stated in Romeo I, supra, 438 F. Supp. at 1034:

> These governmental agencies, particularly the EEOC, were established specifically for the purpose of regulating discrimination in employment practices. These agencies have the expertise and their enabling legislation has provided them with the investigative and enforcement machinery necessary to compel compliance with regulations against sex discrimination in employment. HEW does not have similar enforcement authority.

The Second Circuit Court of Appeals disagreed and described the remedies under Title VII and the Equal Pay Act as "piecemeal." 629 F.2d at 785.

This is clearly inaccurate, as is established by the number of large

class action settlements achieved pursuant to these acts. The Equal Employment Opportunity Commission, under Title VII, and the Department of Labor, under the Equal Pay Act, have been able to reach large class action settlements with employers who have been found to discriminate.[21]

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[21] The Equal Employment Opportunity Commission has brought suit against numerous companies, including AT&T, General Electric and Bank of America, and has won large settlement agreements with these companies providing many millions of dollars to women in back pay and for educational programs (FEP Manual 431:53-124o).

More recently, Ford Motor Company and the EEOC agreed to a twenty-three million dollar conciliation agreement in settlement of claims of employment discrimination. That agreement provided for cash settlements of thirteen million dollars to approximately fourteen thousand women and minorities. Ten million dollars more will be used for training and affirmative action efforts. (See Daily Labor Report, No. 229, November 25, 1980, p. 1)

The remedies available to victims of sex discrimination under Title VII and the Equal Pay Act are not "piecemeal," but serve to make not only one employee, but a large group of employees, whole for any discrimination they may have suffered. These remedies would include back pay, reinstatement, promotion and remedies specifically directed towards the employment environment. Thus, rather than depriving schoolchildren of a remedial reading program when someone in the central office administrative staff has been discriminated against, those

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footnote 21 continued

Similarly, the EEOC recently entered into a consent decree with the Las Vegas casino industry to enable women to enter higher paying positions. That decree established a one million dollar fund for monetary awards to women. (See Daily Labor Report, No. 9, January 14, 1981, p. A22-23.)

remedies serve to make the employee in question whole while not destroying a program established for the benefit of schoolchildren. As the district court noted in North Haven, supra, 19 FEP Cases at 1508: "[t]he termination weapon would be ineffective against sex discrimination in employment . . . ."[22]

In fact, the anomaly is such that in struggling to make sense out of HEW's authority under Title IX, the

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[22]The possible ludicrous result of HEW's position can be seen in the Junior College District case, wherein the original charge of wage discrimination had been filed by an administrative employee, the Assistant Dean for Financial Aid and Placement, and HEW threatened to terminate federal financial assistance. Similarly, the Brunswick and Islesboro school boards were threatened with a cutoff of funds because of their maternity disability policies. It is highly improbable that either situation could infect the classroom environment with sex discrimination.

Department of Justice and the Equal Employment Opportunity Commission have recently proposed regulations under Title IX under which "most complaints of individuals of discrimination [under Title IX] will be referred to EEOC," see 46 Fed. Reg. 22,395 (April 17, 1981), and the Department of Education has announced that it is reviewing some, if not all of, the Subpart E regulations. (See letter dated June 23, 1981 authored by the Solicitor General, Mr. Wade McCree, on behalf of the Department of Education, which was sent to the Clerk of this Court to be filed herein. That letter specifies that the Department of Education is reviewing the Title IX regulations.)

The federal government and individuals already have adequate means

to remedy employment discrimination. A holding that § 901 does not prohibit employment discrimination will not sanction such discrimination. Rather, employment discrimination will be remedied by resort to Title VII; the Equal Pay Act; the post-Civil War civil rights statute, 42 U.S.C. § 1983; the Office of Federal Contract Compliance Programs and various state and local discrimination agencies.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Second Circuit Court of Appeals and reinstate the judgments of the district court.

Respectfully submitted,

Susan K. Krell of Siegel,
O'Connor & Kainen, P.C.
60 Washington Street
Hartford, Connecticut
06106
for the North Haven
Board of Education

Paul E. Knag of
Cummings & Lockwood
1090 Vermont Ave., N.W.
Suite 650
Washington, D.C. 20005
for the Trumbull Board
of Education

NORTH HAVEN BOARD OF
EDUCATION

By Susan K. Krell
Susan K. Krell

TRUMBULL BOARD OF EDUCATION

By Paul E. Knag
Paul E. Knag

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE NORTH HAVEN BOARD OF EDUCATION,
Petitioner,

v.

TERREL BELL, *et al.*,
Respondents,

and

THE TRUMBULL BOARD OF EDUCATION,
Petitioner,

v.

UNITED STATES DEPARTMENT OF EDUCATION
and LINDA POTZ,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT LINDA POTZ

BEVERLY J. HODGSON
KOSKOFF, KOSKOFF & BIEDER, P.C.
55 Chapel Street
Bridgeport, CT 06604
(203) 336-4421

Counsel for Respondent
Linda Potz

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-986

THE NORTH HAVEN BOARD OF EDUCATION,

Petitioner,

v.

TERREL BELL, *et al.*,

Respondents,

and

THE TRUMBULL BOARD OF EDUCATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF EDUCATION and LINDA POTZ,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT LINDA POTZ

Statement of the Case

In October 1977, respondent Linda Potz filed a complaint with the United States Department of Health, Education and Welfare (HEW) seeking remedies for sex discrimination by her employer, the Trumbull Board of Education (Board). Potz, the only female guidance counselor in this public school system's two junior high schools, charged

that the practices of the administration at one of the schools to which she was assigned and the circumstances under which her employment was terminated by the Board constituted discrimination in violation of Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (J. App. 36-37).[1]

Acting under regulations authorized by Congress in Section 902 of Title IX,[2] HEW investigated Potz' complaint and issued a determination that the Board had violated Title IX by, *inter alia:*

— requiring Potz to perform secretarial and other duties not required of her male counterparts (J. App. 37);

— "demeaning . . . [her] in the eyes of her co-workers and counselees" (J. App. 38);

— requiring her to falsify a Title IX report showing her services to students and work load (J. App. 38);

— terminating her contract for reasons motivated by her sex (J. App. 38-39).

HEW solicited remedial action which it specified should include reinstatement and back pay for Potz and removal of adverse documents from her personnel file (J. App. 34). The Department did not specify the nature of the "administrative proceedings or . . . other means authorized by law" (J. App. 34) which it would follow were the Board unwilling to comply. HEW's notification at no point specified

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[1] Page references designated "J. App." refer to the appendix filed jointly by the respondents. "Pet. App." denotes references to the appendix which accompanied the petition for a writ of certiorari.

[2] These regulations, codified since May 9, 1980 at 34 C.F.R. §106.51-106.61, formerly appeared at 45 C.F.R. §86.51-86.61. Subpart E of the regulations applies to employment practices of recipients of federal funds (Pet. App. 8A-19A).

termination of federal funds as the proposed action (J. App. 33-42).

After receiving HEW's adverse determination, the Board sought injunctive and declaratory relief, contending that HEW lacked jurisdiction either to enact regulations or to seek remedies as to the type of discrimination identified by Potz, which it characterized as involving only discrimination in employment (J. App. 26-32). The Board admitted receipt of "substantial" federal funds for such programs as "Project Achieve" and services for handicapped students (J. App. 29-31) but neither stated nor denied that guidance counselors were part of such programs or were paid from federal funds received. Potz sought information concerning the Board's receipt and allocation of federal funds through interrogatories to which the Defendant objected (J. App. 43-44).

Regarding the suit as presenting only the same issues it had decided a month earlier in *North Haven Board of Education* v. *Califano*, 19 F.E.P. Cases 1505 (D. Conn. 1979), (*"North Haven I"*), the district court granted the Board's motion for summary judgment (Pet. App. 76A), granted the relief requested, and denied as moot Potz' motion to compel answers to the interrogatories which would have revealed the nature and use of federal funds received by the Trumbull public school system (J. App. 49). The district court having ruled before the date set for the filing of her brief opposing the Board's motion for summary judgment, Potz filed a motion to set aside the ruling, accompanied by an affidavit pointing out the need for adequate development of the factual record to enable the court to determine the relationship between the discrimination identified by HEW and the consequential discrimination against female students in provision of guidance services. (J. App. 52-53). She also argued that the district court should reconsider its construction of Title IX in light of *Cannon* v. *University of Chicago*, 441

U.S. 677 (1979), (*"Cannon"*), which had been decided after the district court's decision in *North Haven I*. (Pet. App. 79A). *Cannon*, while not concerned with employment, suggested that restrictions not expressed by Congress in Title IX should not be implied by construction.

The district court treated the Trumbull case as involving only issues of employment, rejected any applicability of *Cannon*, and concluded that, despite the broad language of Section 901, Title IX should be construed narrowly as forbidding discrimination only against students and "other direct beneficiaries" of federal educational assistance funds for the reasons stated in *Romeo Community Schools* v. *HEW*, 600 F.2d 581 (6th Cir. 1979). (Pet. App. 77A-93A).

The district court conceded that Potz' case presented a stronger case than *North Haven I* for adopting the theory that discrimination against employees affects students (the "infection theory") but stated "the court does not find that there is a clear nexus between the sexual discrimination against employees and its effect upon students." (Pet. App. 90A-91A). The district court denied Potz' timely-filed motion to set aside the order granting summary judgment to the Plaintiff (Pet. App. 25A), denied her cross motion for summary judgment, *id.*, and left undisturbed its order denying as moot Potz' effort to establish by discovery the nexus between the Board's receipt of federal funds and the guidance services or employment of school personnel (J. App. 49).

The Court of Appeals for the Second Circuit reversed the decisions in both *North Haven I* and *Trumbull Board of Education* v. *United States Department of Education and Linda Potz* (Pet. App. 76A-82A) in a consolidated appeal joined by all defendants. *North Haven Board of Education* v. *Bell*, 629 F.2d 773 (2d Cir. 1980), (*"North Haven II"*) (Pet. App. 20A-48A-2). Concluding that the legislative history of Title IX supported HEW's position that

§ 901 of Title IX applies to discrimination in employment, the Court of Appeals relied on the floor remarks, summaries, and answers to questions of the Senate sponsor of the statute and on the rejection in conference committee of a version approved by the House of Representatives which would have excluded employment from Title IX's coverage.

The Court of Appeals also relied on the rejection in both the Senate and the House of Representatives of proposals to exclude coverage of employment after HEW issued its effectuating regulations. *North Haven II*, 629 F.2d at 783-84, (Pet. App. 43A-44A).

Having upheld the employment regulations in general terms, the Court of Appeals did not reach the ground, proposed as an alternative by Potz, that HEW had authority to issue such regulations because sex discrimination against female employees infects the educational program. *North Haven II*, 629 F.2d at 786, (Pet. App. 48A-2).

Summary of Argument

1. As part of the Education Amendments of 1972, Congress enacted a prohibition against sex discrimination in educational institutions receiving federal financial assistance. Section 901 of Title IX of that statute, 20 U.S.C. § 1681(a), provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." Congress exempted several types of institutions and certain practices of other recipients, but it did not exclude the employment practices of federally assisted educational institutions from the prohibition of § 901. The statute on its face protects employees from being "subjected to discrimination under" such programs.

2. Section 902 of Title IX authorized HEW, as a department empowered to extend federal financial assistance to educational programs, to effectuate the purposes of §901 through administrative regulation of recipients of funds. Monitoring and investigation of sex discrimination are authorized as to all but the specifically exempted activities of covered recipients.

Section 902 identifies two categories of sanctions to be used in achieving compliance: denial or termination of federal funds and "any other means authorized by law." Use of the sanction of termination of federal assistance is limited to those activities of a recipient in which the violation occurs. No such limitation applies if compliance is pursued through other legal remedies. Assistance to all of a recipient's activities may be terminated if the violation creates a discriminatory environment or otherwise infects federally funded activities with discrimination.

Respondent Potz' complaint, more clearly than the complaints at issue in the cases decided outside the Second Circuit, involves employment discrimination which HEW was authorized to remedy as a means of protecting not only Potz but the activities for which it provided funds to her employer. Deference to HEW's expertise in fitting regulations to the objectives of §901 is particularly appropriate in such a context.

3. In addition to §901, Title IX contained proposals to extend the protection of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* and of the Equal Pay Act, 29 U.S.C. §206, to women employed in educational institutions. Neither of these measures conditioned access to a remedy for sex discrimination on the employer's receipt of federal financial assistance.

As to educational programs supported by federal funds, each house of Congress considered proposals meant to insure that public monies would not be spent to support dis-

criminatory practices. The bill passed by the House of Representatives was modeled on Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. Like Title VI, this legislation excluded coverage of employment practices except where a primary objective of the federal assistance was to provide employment.

The Senate, by contrast, never adopted the Title VI exclusion of employment practices when it passed the bill which became Title IX. Its general prohibition against discrimination was, like the House version, patterned on §601 of Title VI; however, the preenactment legislative history of the measure indicates that the Senate meant the broad wording proscribing "discrimination under" a program to cover discrimination in the employment practices of recipients.

In the conference to resolve differences between the House and Senate versions, the House receded from its exclusion of employment practices from the prohibition and remedies of the provisions which became §§901 and 902 of Title IX. Congress's departure from the Title VI model must be given effect, and unexpressed restrictions should not be construed into civil rights legislation.

4. The legislative history of these enactments confirms that the broad wording of §901 was meant to apply to all forms of sex discrimination, including employment discrimination, in federally assisted educational institutions. Sex discrimination in employment was specifically identified as one of the practices prohibited by this portion of the statute by its sponsor, Senator Bayh. In neither the Senate nor the House debates is there any evidence that the amendments of Title VII and the Equal Pay Act were to be the exclusive responses to such discrimination.

5. As authorized by §902 of Title IX, HEW presented for the required Congressional review Title IX regulations including regulation of employment practices. After re-

viewing the department's interpretation of the scope of the statute, Congress made no amendments concerning coverage of employment either to §901 of Title IX or to HEW's regulations, though such amendments were proposed. Proposals to disapprove the regulations failed. Though Congress reacted to some of HEW's interpretations of §901 by enacting more exemptions to that measure, none related to employment practices.

6. The availability of certain remedies for sex discrimination under Title VII and the Equal Pay Act as amended to include employees of educational institutions in no way limits the scope of §901. The statute and its legislative history reveal no grant of exclusive jurisdiction to enforcement agencies other than HEW and no hostility to overlapping and complementary remedies against violators which are recipients of federal funds.

7. Subpart E of HEW's regulations is reasonably related to achievement of the purposes of §901, which are the protection of individual citizens from sex discrimination and the avoidance of use of federal resources to support discriminatory practices.

ARGUMENT

I.

Section 901 of Title IX of the Education Amendments of 1972 Prohibits Sex Discrimination by the Recipients of Federal Financial Assistance to Education Programs, Including Sex Discrimination in Employment.

A. *The Validity of Subpart E Depends on Its Reasonable Relation to the Purposes of §§901 and 902.*

Administrative regulations promulgated under a general authorization by Congress are valid if they are reasonably related to the purposes of the enabling legislation. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973); *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280-281 (1969). The enactment of §§901 and 902 of Title IX was not accompanied by a formal statement of Congressional purpose. Instead, the purpose of these measures is established by the statutory language itself and by the respects in which Congress followed or departed from the text of Title VI of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 252, 42 U.S.C. §2000d (1964), which it used as the model for Title IX.[3] *Cannon*, 441 U.S. at 694-95.

The legislative purpose of §901 is also revealed by contemporaneous Congressional debate and by other legislative history concerning the amendment's enactment.

All of the circuit courts which disapproved regulation of employment practices have asked, in effect, whether it

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[3] Section 601 of Title VI provides as follows:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

was the intent of Congress that only Title VII and the Equal Pay Act apply to employment practices, not whether such coverage as to recipients of federal funds is reasonably related to the purposes of §901. The distinction between "intent" and "purpose" has been given effect by this Court in *Cannon*, its only decision interpreting Title IX. In that case, the Court applied the four factors of *Cort* v. *Ash*, 422 U.S. 66 (1975), to establish whether §901 is enforceable through private suits as well as by administrative enforcement. To determine whether Congress had an intent to create or deny such a remedy, the Court considered the legislative history of Title IX. *Cannon*, 441 U.S. at 694-703. To determine whether Congress' purpose in enacting §901 would be served by recognition of a private right of action, the Court examined the objectives of Title IX. *Cannon*, 441 U.S. at 703-06.[4] It ruled that those objectives are as follows:

> First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.

Cannon, 441 U.S. at 704.[5] The *intent* of Congress concerning application of a statute to a particular circumstance may be incapable of ascertainment beyond the determination whether that circumstance is expressly exempted. The *purpose* of an enactment is identified by determining the goal of Congress when it undertook the legislation.[6]

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[4] Note, *Eliminating Sex Discrimination in Educational Institutions: Does Title IX Reach Employment?*, 129 U. PENN. L. REV. 417, 438-39 n. 104-105 (December 1980).

[5] The Court referred to §901 as "Title IX" in *Cannon*. Since that case did not involve any other subsections of Title IX, the objectives identified are those of §§901 and 902.

[6] Professor Archibald Cox has provided an example of the way the intent differs from the purpose of legislation:

> In enacting the Fair Labor Standards Act . . . it was the "purpose" of Congress to raise the standard of living of work-

B. *The Statutory Language of §901 States Broad Coverage of the Activities of Recipients of Federal Funds.*

Section 901 of Title IX, 20 U.S.C. §1681(a), provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Except for the substitution of "sex" for "race," and the specification of *education* programs, this language is identical to the full text of the corresponding prohibition of Title VI, at §601 of the Civil Rights Act of 1964.

The court below held that § 901 applies to employment practices of a recipient of federal funds but that § 902 restricts the use of fund termination as a sanction for violation. *North Haven II, supra.* Four other appellate courts have adjudged prohibition of employment discrimination by federally assisted educational institutions to be beyond the scope of § 901. *Seattle University* v. *United States Department of Health, Education and Welfare,* 621 F.2d 992 (9th Cir.) cert. granted, —— U.S. ——, 101 S. Ct. 563 (1980), (*"Seattle University"*); *Romeo Community Schools* v. *HEW,* 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979), (*"Romeo"*); *Junior College District of St. Louis* v. *Califano,* 597 F.2d 119 (8th Cir.) cert. denied, 444 U.S. 972 (1979), (*"St. Louis"*); *Islesboro School Committee* v. *Califano,* 593 F.2d 424 (1st Cir.) cert. denied, 444 U.S. 972 (1979), (*"Islesboro"*). The court of appeals for the Fifth Circuit has held more narrowly that § 901 applies to em-

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ers engaged in interstate commerce or in the production of goods for commerce. When it defined production to include "any process or occupation necessary to the production thereof," Congress "intended" . . . to make the act applicable to maintenance workers in the executive offices of interstate producers.

Cox, *Judge Learned Hand and the Interpretation of Statutes,* 60 HARV. L. REV. 370, 371 (1947) (footnote omitted).

ployees paid with federal funds and not to employment discrimination against a recipient's other employees. *Dougherty County School System* v. *Harris*, 622 F.2d 735 (5th Cir. 1980), *pet. for cert. filed*, Dec. 22, 1980 (49 USLW 3495) ("*Dougherty*"). These courts have identified coverage more narrowly than the actual language of the statute compels. Each has construed § 901 as prohibiting discrimination only against "beneficiaries" of federal programs and has, with the exception of *Dougherty*, identified students or recipients of grants in the particular categorical programs assisted by federal funds as the sole beneficiaries.[7]

All six courts of appeals which have considered the validity of Subpart E of HEW's regulations have searched for the intent rather than the purpose of Congress in enacting § 901. This shift from the standard of review stated in, *e.g.*, *Mourning* v. *Family Publications Service, Inc.*, *supra*, appears to be a response to the inclusion of amendments to Title VII of the Civil Rights Act of 1964 and of the Equal Pay Act in the original version of Title IX. As is detailed below, the appellate courts recognized the Congressional purpose of prohibiting sex discrimination against those employed in educational institutions but, except for the Second Circuit, and, to a lesser extent, the Fifth Circuit, they attributed that purpose narrowly to these amendments rather than to Title IX generally. These decisions erroneously constrict the purposes of Title IX with regard to regulation of recipients of federal assistance to education.

Whether their appeal is characterized as a construction of purpose or of intent, *Romeo* and *Islesboro* construe sufficiently the reference of § 901 to "denied the benefits of". They accord no meaning, however, to the phrase "sub-

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[7] *Islesboro*, 593 F.2d at 426; *Romeo*, 600 F.2d at 582. *St. Louis*, 597 F.2d at 121, and *Seattle University*, 621 F.2d at 992, adopt the reasoning of these decisions.

jected to discrimination under;" and they ignore the use of the phrase "no person" instead of any more limited term, such as "no student." Since all words of a statute are to be given effect and not regarded as insignificant or superfluous, *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1954); *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1882), these courts' under-inclusive interpretation of the statute's purpose is erroneous. Teachers in a public school system are "subjected to discrimination under" a recipient's programs when they are denied equal treatment on the basis of their sex.

Unlike § 601, § 901 as originally enacted included some exceptions to the general prohibition. Congress exempted certain recipients entirely[8] and excluded the admissions policies of other recipient institutions.[9] The Title VI model from which Congress adopted much of the text of Title IX also included, at §604, a provision expressly excluding most employment practices of recipients:

> Section 604. Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Pub. L. 88-352, 78 Stat. 253, 42 U.S.C. § 2000d-3 (1964).

Congress neither incorporated the wording of § 604 in an analogous section as part of Title IX nor listed employment among the exemptions enumerated in § 901.

The petitioners' invocation of interpretations of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *as amended* (Supp.

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[8] 20 U.S.C. §1681(a)(3), (4).

[9] 20 U.S.C. §1681(1), (2), (5).

1978),[10] as support for a restrictive reading of § 901 is inapposite. While that statute does indeed contain wording corresponding to § 901, the cited judicial constructions depend on the view that the Rehabilitation Act of 1973, as amended in 1978, adopted the limitations of § 604 by restricting coverage to "[t]he remedies, procedures, *and rights* set forth in Title VI of the Civil Rights Act of 1964. . . ." 29 U.S.C. § 794(a)(2) (emphasis supplied). The cited ruling of the Second Circuit in *United States* v. *Cabrini Medical Center*, 639 F.2d 908, 911 (2d Cir. 1981), like those of the other circuit court opinions cited, is based on this "explicit incorporation of § 604 of Title VI"[11] as the reason for restricting the applicability of § 604 to employment to situations in which the primary objective of the Federal assistance was to provide employment. While this Court has never reviewed the correctness of such an interpretation, it is plain that since § 901 contains no such incorporation, there is no reason to imply any such restriction to its scope.

Judicial interpretations of Title VI at the time Congress passed Title IX recognized coverage of the personnel practices of educational institutions in certain circumstances despite the language of § 604. In *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), opinion adopted en banc, 380 F.2d 385 (5th Cir. 1967), cert. denied, *Caddo Parish School Board* v. *United States*, 389 U.S. 840 (1967), ("*Jefferson County*"), teacher assign-

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[10] *Simpson* v. *Reynolds Metals Co., Inc.*, 629 F.2d 1126, 1234 n.13 (7th Cir. 1980); *Carmi* v. *Metropolitan St. Louis Sewer District*, 620 F.2d 672, 674 (8th Cir.), cert. denied, —— U.S. ——, 101 S. Ct. 249 (1980); *Trageser* v. *Libbie Rehabilitation Center*, 590 F.2d 87, 88 (4th Cir.) cert. denied, 442 U.S. 947 (1979).

[11] One court, finding no legislative history to support the view that Congress meant the limitations of §604 to apply to Rehabilitation Act claims, has upheld the statute's coverage of a recipient's employment practices. *Hart* v. *County of Alameda*, 485 F. Supp. 66, 72 (N.D. Cal. 1979).

ments in a segregated school system were held to be within the remedial scope of Title VI because of HEW's determination that discriminatory practices infected the provision of services to students (the "infection theory").

HEW's authority under Title VI to investigate all of a recipient's practices, including "information about the composition of the College's work force . . . [and] its recruiting and hiring procedures for academic and other positions . . ." was also upheld in *United States* v. *El Camino Community College Dist.*, 600 F.2d 1258, 1259 (9th Cir. 1979) (*"El Camino"*), despite the exclusion regarding employment practices stated in § 604. Possible impact on the intended beneficiaries of assistance was, as in *Jefferson County, supra*, the basis for upholding HEW's regulations and investigation. The benefits accruing to an educational institution in general from receipt of federal funds for any purpose were identified as a reason for recognizing the application of § 601 to all practices of the institution in *Bob Jones University* v. *Johnson*, 396 F.Supp. 597, 602-603, (D.S.C.) aff'd mem., 529 F.2d 514 (4th Cir. 1975). The court stated that this construction comported with the Congressional purpose underlying Title VI, 396 F.Supp. at 604.[12]

As this Court observed in *Cannon*, 441 U.S. at 697-99, Congress is presumed to have been familiar with judicial constructions of Title VI when it used §601 as a model. Had it viewed these interpretations as erroneous, it could have specifically excluded employment at the time of the original enactment of §901 in 1972 or when it added other exemptions in 1974 and 1976.[13]

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[12] The wording of Section 122 of Title I of the State and Local Assistance Act of 1973, 31 U.S.C. §1242(a), which is identical in all relevant respects to §901 of Title IX, has likewise been held to protect employees of federally funded programs. *United States v. City of Chicago*, 395 F. Supp. 329 (N.D.Ill.), aff'd 525 F.2d 695 (7th Cir. 1975).

[13] Discussion of the post-enactment amendments of §901 appears at pages 34-37 below.

The courts which have taken a restrictive view of the Congressional purpose in enacting §901 have failed to adopt the approach required by this Court in *Cannon*, 441 U.S. at 689, of deciding questions concerning the scope of Title IX by looking to the statute itself. They have even reversed usual principles of statutory construction[14] by reading the failure to list employment among the exceptions to §901(a) as evidence of a purpose to exempt it. *Islesboro*, 593 F.2d at 426; *Romeo*, 600 F.2d at 584.

The absence from Title IX of an exemption for employment practices analogous to §604 of Title VI is conspicuous. Where Congress has borrowed selectively from other anti-discrimination statutes, judicial construction of statutory language must give effect to departures from as well as adherences to the model.

In interpreting the Age Discrimination in Employment Act, Pub. L. 90-202, 81 Stat. 602, 29 U.S.C. §621 *et seq.* (ADEA) for example, this Court has noted that both the prohibitory language, *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978), and certain of the procedural requirements of the ADEA, *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979), were adopted nearly verbatim from sections of Title VII of the Civil Rights Act of 1964. Despite the similarity of language and despite legislative history indicating that the source of §14(b) of the ADEA, Title 29 U.S.C. §633(b), was §706(c) of Title VII, 42 U.S.C. §2000e-5(c), this Court declined to construe the ADEA as adopting the restrictive provision of 42 U.S.C. §2000e-5(c), which requires an aggrieved person to file with a state anti-discrimination agency before filing with the Equal Employment Opportunity Commission. Instead, the failure of Congress specifically to adopt the limiting language was read

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[14] R. Dickerson, THE INTERPRETATION AND APPLICATION OF STATUTES, 201-202 (1975) (unless the legislature has imbued a statute with negative implications, courts have power to apply broadly the principles announced by the statute); Sands, 2A SUTHERLAND STATUTORY CONSTRUCTION §53.05 (4th ed. 1973).

as permitting simultaneous filing with both agencies. *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756-757.

The silence of the ADEA concerning the availability of trial by jury in age discrimination cases was likewise resolved contrary to the Title VII model and case law. In *Lorillard* v. *Pons* the selective incorporation of portions of Title VII and omission of other features were construed as evidence of Congress' intent to deviate from Title VII's restrictions.

Section 901 of Title IX is remedial civil rights legislation which should be broadly interpreted in order to effectuate Congress's objectives. See, *e.g.*, *Daniel* v. *Paul*, 395 U.S. 298, 307-308 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968). The expansive wording of §901 and the absence of any statutory language exempting employees from the prohibition against being "subjected to discrimination under" a federally assisted education program require the conclusion that Congress meant to include coverage of the employment practices of recipients of federal funds.

Moreover, because HEW is an executive department with expertise in educational policy and administration, its contemporaneous judgment as to the regulations necessary to effectuate the purposes announced by the statute's nonrestrictive language is entitled to deference. See, *e.g.*, *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Udall* v. *Tallman*, 380 U.S. 116 (1965). Deference to HEW's interpretation at the time it promulgated the regulations is particularly appropriate because of that department's role in enforcing Title VI. *Lau* v. *Nichols*, 414 U.S. 563, 571 (1974) (Blackmun, J., concurring in the result).

C. *The Regulations Are Consistent With the Application of Title IX to Federally-Assisted "Programs".*

1. The Language of §901 as a Whole and Judicial Constructions of the Title VI Model Belie the Theory That Title IX Was Meant to Apply Narrowly to Funded Programs.

The court in *Romeo*, 600 F.2d at 584, took the mistaken view that because § 901 prohibits sex discrimination in "education programs and activities", the statute must be narrowly construed as authorizing regulations and remedies only in precise parts of an educational program paid for with federal funds. The Fifth Circuit in *Dougherty*, 622 F.2d at 738, stated that HEW has authority to regulate employment if its efforts are limited to "specific programs that receive federal financial assistance." *Accord, Othen* v. *Ann Arbor School Board*, 507 F. Supp. 1376, 1382 (E.D. Mich. 1981). This view, if accurate, would require federal funding agencies and departments to track federal dollars through each recipient's budget process as a precedent to each investigation and order. It would also encourage inventive bookkeeping by recipients motivated to insulate their federal monies from department investigation but would not serve the Congressional objective of avoiding support of discrimination.

The language of § 901 read as a whole and the legislative objective in enacting Title IX negate this construction.

While the first sentence of § 901 uses the words "education program or activity," Congress used "educational institution" and "education program" interchangeably for purposes of defining areas of exclusion in the subsections which follow this general prohibition. If Title IX applied strictly to programs within institutions, it would not have been necessary to include exemptions for any function or activity of educational institutions which was not of the type for which federal assistance is available. Such functions would simply, by their terms, not fit the definition of

"education program or activity receiving federal financial assistance." If Title IX applied exclusively to federally-assisted programs within institutions, there would have been no need specifically to exempt such activities as social fraternities,[15] father-son banquets,[16] or beauty pageants,[17] which are not the type of pursuits supported by federal grants.

The exemptions stated at subsections 1681(a)(1)-(5) equate "educational institutions" of specified types with the "education programs" referred to in § 901(a) by exempting not just programs within those institutions but, in some cases, particular functions of the institutions, such as admissions,[18] or the entire institution.[19]

The exemption of particular institutions or functions of institutions reflects Congress's plain view that all of the activities of a recipient are otherwise part of its "program." As the Second Circuit observed, *North Haven II*, 629 F.2d at 785, employment practices are no less "program-specific" than admission practices, which are plainly included except where specifically exempted.

Congress's use of the language of § 601 of Title VI rather than, for example, such language as "no recipient of federal financial assistance shall . . ." cannot be read as a rejection of coverage of recipients in favor of coverage only of specific programs. In the House of Representatives, Representative Mink forcefully stated the need to stop supporting institutions which discriminate on the basis of sex:

> Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be

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[15] 20 U.S.C. §1681(a)(6) (1974).

[16] 20 U.S.C. §1681(a)(8) (1976).

[17] 20 U.S.C. §1681(a)(9) (1976).

[18] 20 U.S.C. §1681(a)(1), (2), (5) (1972).

[19] 20 U.S.C. §1681(a)(3), (4) (1972).

> used for the support of institutions to which we are denied equal access.

117 Cong. Rec. 39252 (1971). The legislative history of Title IX in no way supports the view that Congress was willing to prohibit sex discrimination only in federally-funded activities but not otherwise within institutions receiving federal funds. On the contrary, the impetus for enacting Title IX in 1972 was dismay with broad institutional practices, including, for example, the gross underrepresentation of women on American college faculties.[20]

In *Cannon*, 441 U.S. at 704, this Court identified one objective of §901 as "avoid[ing] the use of federal funds to support discriminatory practices."

In construing the language of §§601 and 602 of Title VI, this Court also equated "program" and "recipient" in *Lau* v. *Nichols, supra*, 414 U.S. at 567-568. That case rested on a determination whether the references in §§601 and 602 to "any program or activity receiving Federal financial assistance" authorized HEW to regulate generally a recipient's services to non-English-speaking students. HEW guidelines conditioning receipt of federal funds on provision of services beyond those supported by such funds were upheld as reasonably related to the purposes of §601, which the Court identified as the prevention of discrimination by recipients. *Lau* v. *Nichols*, 414 U.S. at 569. The Court did not condition its approval of the HEW guidelines disputed therein on a showing of program-specificity.

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[20] In introducing Title IX in the Senate, Senator Bayh made plain the concern that "sex discrimination reaches into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing and pay scales". 118 Cong. Rec. 5803 (1972). He provided statistics showing that "the rule is that once hired, women do not receive advancement as often as men." 118 Cong. Rec. 5804-05 (1972). See also the report of the 1970 hearings on a proposed precursor to Title IX. *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong. 2d Sess. (1970).

Rather, the Court considered the entire school system as a "program'. Though the language borrowed from §601 of Title VI, which the petitioners identify as "program specific," may have had a narrowing purpose in 1964 when Congress debated and enacted Title VI, by 1972 the meaning of this language had been construed broadly by the Fifth Circuit, which perceived that so-called "pinpoint" regulation would not accomplish Congress's ends where the pinpoints were lost in a background of pervasive discrimination. *Board of Public Instruction of Taylor County* v. *Finch*, 414 F.2d 1068, 1075, 1078 (5th Cir. 1969) ("Taylor County"). In 1969 the "program specific" wording of Sec. 601 had been construed by the Fifth Circuit as permitting investigation of all the practices of a recipient institution to determine whether any discrimination was isolated to an extent that it did not affect funded programs. *Id.* As the Second Circuit correctly noted below, at the time Congress used the §601 language as a model for Title IX, that language had also been construed to permit both investigation and regulation, including fund termination, where discrimination in a recipient's non-funded activities had a sufficient nexus with funded functions. *Jefferson County*, 372 F.2d at 847-61.[21]

Congress is presumed to be aware of intervening judicial constructions of prior statutes when it adopts that language in subsequent legislation. In *Cannon*, 441 U.S. at 696-699, this Court construed Title IX as implying a private cause of action because its model, Title VI, had been so construed by the Fifth Circuit.[22] The same presumption

[21] See also *El Camino*, 600 F.2d at 1260 (Title VI investigatory power, unlike regulatory power, applies to entire institution because "HEW must have substantial latitude in scrutinizing policies and practices of the institution that may have a discriminatory impact on the intended beneficiaries of assistance.")

[22] The impression of some Senators before the passage of Title VI that no private cause of action existed was not seen by this Court as a reason to imply a right of action to enforce Title IX. *Cannon*, 441 U.S. at 714-17.

of familiarity with case law and adoption of judicial construction is appropriate in this context, as Congress could easily have altered the language of §601 if it sought to avoid the interpretations imposed in *Taylor County* and *Jefferson County*.[23] Moreover, as is noted above, Congress's wording of exemptions to § 901(a) indicates recognition of the scope which the language of § 601 had been accorded.

2. "Program Specificity" Is Limited to Fund Termination.

The only point in Title IX at which Congress differentiated between "recipients" and "programs" is in the clause of § 902 defining those situations in which the denial or termination of funds may be used to secure compliance. The first sentence of § 902 plainly empowered HEW to investigate and regulate "by issuing rules, regulations or orders of general applicability . . ." . The so-called "pinpoint" provision occurs only at subsection (1) concerning termination of funds to the particular non-compliant "program or part thereof" of a recipient. No such limitation is stated in subsection (2) of § 902 as to pursuit of compliance "(2) by any other means authorized by law." The limitation stated in subsection (1) would be unnecessary if the general power of a granting department were already so limited in all respects, and § 902 should therefore be construed as Title VI was in *Taylor County* and in *El Camino*, 600 F.2d at 1260, to restrict only HEW's ability to apply the sanction of fund termination, and not as a limitation on its investigatory or other remedial powers.

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[23] Congressional commentary concerning program-specificity before the enactment of Title VI likewise concerned primarily the availability of fund termination under §602 rather than the scope of §601, 110 Cong. Rec. 2486, 7059, 7062, 7067, 12689, 12714-15 (1964). *Iron Arrow Honor Society* v. *Hufstedler*, 499 F.Supp. 496, 504 (S.D. Fla. 1980) treats "program" and "institution" as interchangeable terms in construing Title IX.

3. The "Pinpoint" Approach Does Not Apply Even to Fund Termination Where There Is a Nexus Between the Discrimination and Funded Programs or Their Student and Faculty Beneficiaries.

Even the Fifth Circuit decision from which the "pinpoint" argument is derived recognized that "if [federal funds] support a program which is infected by a discriminatory environment, then termination of funds is proper." *Taylor County*, 414 F.2d at 1078.[24] The nexus between a recipient's discriminatory practices outside of federally-assisted activities and an effect on the environment of these activities has been recognized as a basis for Title IX coverage of employment by the Second Circuit not only in this action but also in *Caulfield* v. *Board of Education*, 632 F.2d 999, 1005 (2d Cir. 1980), in which the court identified the so-called "infection theory" as the basis for jurisdiction as to a decree redressing sex discrimination in employment.[25] Though the Fifth Circuit in *Dougherty* mingled theories concerning the definition of a "beneficiary" under Title IX with references to program-specificity, it also indicated the validity of regulation of employment through fund termination where there is a nexus between the employment and the federally-assisted program.[26]

An entire school system's eligibility to receive federal funds was the issue in *Jefferson County, supra*, 372 F.2d at 847-848, 883. In that case, the Fifth Circuit recognized that

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[24] This interpretation was cited by HEW as support for the Title IX regulations. 40 Fed. Reg. 24128 (1975).

[25] The Second Circuit read §604 of Title VI restrictively in *Ass'n Against Discrimination* v. *City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981); however, that case, which concerned personnel practices in a municipal fire department, did not involve the infection theory.

[26] The discussion of this issue in *Dougherty* does not go beyond the most obvious case, sex discrimination against employees whose salaries are paid with federal funds. *Dougherty*, 622 F.2d at 737-738.

the mandate of eliminating discrimination in federally supported programs cannot be achieved if a recipient's discriminatory practices of a type not specific to a particular program have an impact on the environment in which the programs are conducted.

The circuits which have disagreed with the Second Circuit as to HEW's general authority have nevertheless recognized that HEW does have a narrow authority to regulate employment where discrimination in employment has an impact on, or a "nexus with" other aspects of a recipient's programs. *Dougherty*, 622 F.2d at 737-738; *Islesboro*, 593 F.2d at 430; *St. Louis*, 597 F.2d at 121 n.3.[27]

In cases brought under Title VI, the Courts have in effect recognized the expertise of the enforcing agency in concluding that discrimination in one aspect of a recipient's practices affects the rest of the program. *Lau* v. *Nichols*, 414 U.S. 563; *Caulfield* v. *Board of Education of the City of New York*, 583 F.2d 605, 611, aff'd after remand, 632 F.2d at 1005 (2d Cir. 1980); *Jefferson County*, 372 F.2d at 882-886. Departure from this deference in the context of Title IX may proceed from a view that maternity benefits (*Islesboro, Romeo*) and equal pay, (*St. Louis, Seattle University, Dougherty*) the issues in every complaint except Potz's, have an effect so confined to the employee that no nexus can be recognized.

4. Application to the Facts of the Potz Complaint Reveals That the Regulations Are Consistent With Congress's Objectives in Enacting Title IX.

In this case the Second Circuit noted that up to two-thirds of the federal funds received by the North Haven

[27] See also *Iron Arrow Honor Society* v. *Hufstedler*, *supra*, 499 F. Supp. at 502, 504, 506, in which the relationship between a males-only society and its benefits to students was adjudged to create a sufficient nexus to allow administrative prohibition of university assistance to the society.

Board of Education were used to pay teachers' salaries. *North Haven II*, 629 F.2d at 774.[28] Where a very substantial portion of federal funds is used for employment, it is artificial and contrary to the Congressional objective to disregard sex discrimination in personnel policies and practices, especially in the absence of an exemption of these areas.

The nexus between sex discrimination against Potz and sex discrimination affecting students and the school environment in general appears in HEW's letter of findings. (J. App. 33-42). The highly public termination of one of the few women with administrative duties in the town's school system (J. App. 39) presented an entirely different scenario than a differential in pay checks, a generally invisible form of discrimination. The Board's discriminatory treatment of Potz "had a demeaning effect on complainant in the eyes of her co-workers and counselees," (J. App. 38), as did her assignment to secretarial functions, which stereotyped her and diminished her status as a professional (J. App. 37).

Additionally, the school administration retaliated against Potz because of her objection to falsifying a portion of the Board's required Title IX self-evaluation which would have indicated inequalities in the provision of guidance services to female junior high school students (J. App. 38). Potz, the only female guidance counselor at the junior high school level, was sought out by female students to serve as a confidant and adviser in adolescent gender-related problems. As a result, she had a disproportionately heavy counseling load; and female students had less access to a counselor of their own sex than did male students (J. App. 52-53). The school principal's displeasure at the assignment of a wom-

[28] The refusal of the district court to allow Potz discovery as to the nature and use of federal funds that the Board had admitted were "substantial" prevented a similar analysis as to the Trumbull Board of Education. See Statement of the Case, above.

an to the administrative functions of the school (J. App. 39), coupled with Potz' termination even after students and parents had rebutted the precise incidents relied on by the Board as justification (J.A. App. 42), are plainly the kind of negative lesson to female students which constitutes an infection of the learning environment of federally-funded programs.[29]

It should be noted that HEW's order to the Board does not specify use of fund termination as an ultimate remedy (J. App. 34). This "threat" was merely assumed by the Board at the time it applied for injunctive relief (J. App. 30). HEW's successor agency, the Department of Education,[30] may, so far as the record reveals, intend to use less punitive means such as an action for injunctive relief, as

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[29] HEW's expertise in educational theory and practice must be accorded deference in assessing its order of reinstatement of Potz as a visible means of undoing the damage caused by the unequal and stereotypical treatment to which she had been subjected. The effect of personnel policies on student aspirations is documented in the following social science literature and testimony: Murray, *Economic and Education Inequality Based on Sex: An Overview*, 5 VAL. U.L. REV. 237, 269-70 (1971); Scott, *The Half-Eaten Apple: A Look at Sex Discrimination in the University*, reprinted in 1970 House Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor, 91st Cong., 2d Sess. (Part 1) (1970); Tidball, *Women's Colleges and Women Achievers Revisited*, 5 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 504, 508 (1980); Hearings on Sex Discrimination and Sex Stereotyping in Vocational Education before the Subcomm. on Elementary, Secondary and Vocational Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. (1975) at 2-13 (testimony of Dr. Marilyn Steele) and *id.* at 102-114 (prepared statement of Pamela Ann Ruby).

[30] The functions of HEW under Title IX of the Education Amendments of 1972 were transferred to the Department of Education upon the creation of that department by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678, 20 U.S.C. §§3401-3510 (Supp. III, 1979).

the "other means authorized by law" in § 902 if voluntary compliance is not forthcoming.[31]

In these circumstances, however, the Department is not precluded from using fund termination to secure compliance. Whether or not personnel practices are viewed as a "program" of a recipient which devotes a substantial part of its federal funds to salaries, as the Second Circuit implied, *North Haven II*, 629 F.2d at 785, the nexus between the discriminatory treatment of Potz and discrimination in the environment in which the Board's federal programs operate also qualifies this case as an appropriate context for use of the fund termination sanction for the reasons found in *Jefferson County* and *Caulfield* v. *Board of Education of the City of New York*, 632 F.2d at 1005.

The differences in substance between the Potz complaint and those which provided the factual setting for the deliberations of the other circuits highlight the propriety of the Second Circuit's conclusion and the wisdom of recognizing the funding agency's expertise by allowing it to investigate as broadly as necessary. Disputes as to the proper scope of remedies upon a finding of non-compliance should be left to enforcement proceedings, at which a full factual record is available.

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[31] The parallel remedy language of Title VI was envisioned by Congress as permitting lawsuits for remedial injunctive relief. See, *e.g.*, 110 Cong. Rec. 7067 (1964) (Sen. Ribicoff):

> "Personally, I think it would be a rare case when funds would actually be cut off. In most cases alternative remedies, principally lawsuits to end discrimination, would be the preferable and more effective remedy."

See also *id.*, at 5090, 6544 (Sen. Humphrey); *id.*, at 7103 (Sen. Javits).

II.

The Legislative History of Title IX Confirms That Its Purpose Was to Prohibit Discrimination by Recipients of Federal Funds With No Exemption for Employment Practices.

A. *Pre-Enactment Debate and Resolution of Differences Between the Senate and House Versions by the Conference Committee.*

The legislative history of Title IX supports the conclusion that protection of employees of recipients of federal assistance to educational programs was part of Congress's purpose in enacting this measure. As is surely usual in Congressional debate, some supporters of the legislation confined their remarks to specific areas of coverage, such as student admissions, without professing to be furnishing either exclusive or complete interpretations of §901. By contrast, when Senator Bayh, the sponsor of the version of the statute passed by the Senate, introduced this amendment,[32] his explanation was presented as a summary of its scope:

> Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs and employment resulting from those programs. . . . More specifically, the heart of this amendment is a provision banning sex discrimination in educational programs receiving federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, *and faculty employment*, with limited exceptions. Enforcement powers include fund termination provisions—and appropriate safeguards—parallel to those found in Title VI

[32] This amendment was designated as Amendment No. 874 and was originally proposed as an additional "Title X" in S-659.

> of the 1964 Civil Rights Act. Other important provisions in the amendment would extend the equal employment opportunities provisions of Title VII of the 1964 Civil Rights Act to educational institutions and extend the Equal Pay for Equal Work Act to include executive, administrative and professional women.

118 Cong. Rec. 5802-5803 (1972) (emphasis supplied). The clarity of Senator Bayh's reference to employment discrimination in connection with federally-funded programs precludes the conclusion of the courts in *Romeo*, 600 F.2d at 585, and in *Isleboro*, 593 F.2d at 428, that he was referring to the amendment proposing expansion of Title VII. Moreover, as Title VII is not restricted to employers which receive federal funds, these courts' interpretation relies on the assumption, rendered unlikely by the structure of his remarks, that Senator Bayh did not have in mind the differences between the approach to recipients of federal funds and amendments applicable to all educational institutions.

Senator Bayh also prepared for the record a written summary of the goals and coverage of the various portions of his 1972 amendment. 118 Cong. Rec. 5806-5808 (1972). In the first part of his summary, titled "A. Prohibition of Sex Discrimination in Federally Funded Education Programs," Senator Bayh described the basic prohibition against sex discrimination, the exclusions, and the enforcement provisions which became §§901 and 902 of Title IX. *Id.* at 5807. Under the heading "B. Prohibition of Education Related Employment Discrimination," he described the amendments of Title VII and the Equal Pay Act to include teachers. While employment discrimination is not referred to in the heading which precedes Senator Bayh's description of the provisions which became §901, the substance of the summary establishes that this basic prohibition was also meant to apply to employment discrimination by recipients:

> This portion of the amendment covers discrimination in all areas where abuse as been mentioned—*employment practices for faculty and administrators,* scholarship aid, admissions, access to programs within the institution such as vocational educational classes, and so forth.

Id. (Emphasis supplied).

This summary confirms that §901, as well as the amendments to Title VII and the Equal Pay Act, applies to employees.[33] It also demonstrates the error of the Fifth Circuit's conclusion in *Dougherty* that §901 relates only to employees within federally funded activities in an institution's educational program. Senator Bayh's enumeration of "access to programs within the institution" as one of the areas covered indicates that discrimination in employment and other practices is prohibited throughout the institution administered by a recipient of federal funds. If §901 applied only to specific federally funded activities, the mention of admissions and employment would similarly have been confined to "programs within an institution," and no distinction would have been necessary as to any of the enumerated areas.

In the floor debate of the Bayh amendment, Senator Pell requested Senator Bayh to clarify the scope of §1001 (a) and (b), the predecessors of §§901(a) and (c) of Title

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[33] Part "A" of the summary begins with the statement, "[c]entral to my amendment are sections 1001-1005, which would prohibit discrimination on the basis of sex in federally funded education programs." *Id.* at 5807. Since Title VII, to which §1005 proposed amendment, is not limited to federally assisted programs, the focus of Part "A", this reference may reflect confusion with the numbering of the provisions of Title X of the original House bill, H.R. 7248, which included an additional section concerning coverage of recipients of federal funds. Because Part A is identified as the description of the coverage of such recipients and because the amendment of Title VII is discussed in Part B, this reference is correctly interpreted either as a misprinting for "sections 1001-1004" or as an oversight. *North Haven II,* 629 F.2d at 781 n.11.

IX. The responses show clearly that the amendment's sponsor intended employment practices to be covered by §901:

> MR. PELL . . . Sections 1001(a) and (b) include all educational institutions which receive Federal assistance. This includes elementary and secondary schools as well. With regard to private undergraduate colleges, the Senator has excluded from coverage their admissions practices. Does the same exclusion apply to nonpublic institutions at the elementary and secondary level?
>
> MR. BAYH. At the elementary and secondary levels, admissions policies are not covered. As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, *and discrimination in employment within an institution, as a member of a faculty or whatever.*
>
> *In the area of employment, we permit no exceptions.* In the area of services, once a student is accepted within an institution, we permit no exceptions. The Senator from Rhode Island asked about admissions policies of private secondary and primary schools. They would be excepted.
>
> • • •
>
> MR. PELL . . . [D]o I understand the Senator to say that the faculty of private schools would have to reflect a sexual balance?
>
> MR. BAYH. This amendment sets no quotas. It only guarantees equality of opportunity. The Senator from Indiana cannot be sure about the sexual balance in any faculty, but *as far as employment opportunities are concerned, the answer would be "Yes."*
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> • • •

MR. PELL. Would this apply to a parochial school where they have nuns as *teachers?*

MR. BAYH. No. *There is an explicit exception for education institutions controlled by a religious organization.*

• • •

MR. PELL. Mr. President, I refer to a preparatory school such as Peekskill Military Institute which is at the high school level. Would that school be expected to have *women teachers?*

• • •

MR. BAYH. *All military school are excluded.*

118 Cong. Rec. 5812-13 (1972) (emphasis supplied).

The omission from the Senate version of Title IX of any section parallel to §604 of Title VI created a conflict between this legislation and the version passed by the House in H.R. 7248, which included such a provision as §1004.

The debate in the House did not include any specific discussion of §1004, 117 Cong. Rec. 39248-39353 (1971) and there is no indication of hostility in the House to coverage of employees in institutions receiving federal funds[34] under what is now §901 of Title IX as well as under Title VII and the Equal Pay Act.

When a conference committee met to resolve the differences between the House and Senate versions, the Senate approach prevailed. As the committee explained, H.R. Rep. No. 92-1085, 92d Cong. 2d Sess. 221 (1972), reprinted in 1972 *U.S. Code Cong. & Admin. News* 2671-2672:

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[34] During hearings concerning HEW's regulations in 1975, Representative Mink reviewed the legislative history of Title X and stated that employment was "indeed covered," Hearings before the Subcommittee on Post Secondary Education of the Committee on Education and Labor, House of Representatives, 94th Congress, 1st Sess., at 164 (1975) ("1975 Subcomm. Hearings").

> (f) In addition, the House amendment, but not the Senate amendment, provided that nothing in the title authorized action by any department or agency with respect to any employment practice of any employer, employment agency or labor organization, except where a primary objective of the Federal financial assistance is to provide employment. The House recedes.

Whether the initial inclusion of §1004 in the House version was "a drafting error" or in some other respect accidental[35] is of no significance. The House version of Title IX was clearly divisible into two parts: (1) those provisions addressing discrimination by recipients of federal funds (§§1001-1006) and (2) those provisions applicable to practices of entities other than such recipients (§§1007-1008). 117 Cong. Rec. 39365 (1971). The fact remains that at the time members of the House voted on the amendment it contained language limiting the scope of §901. It cannot be determined how many votes may have been cast on the assumption that employment practices of recipients of federal funds would not be subject to administrative remedies comparable to Title VI as well as to those applicable under Title VII.

No floor debate in the House supports the contention that the reason for passage of Title IX in 1972 was the difference between H.R. 7248 and previous proposals which would have made inclusion of employment more specific. In *Cannon* the adoption of a revision which dropped a specific reference to a private right of action was not read as

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[35] This explanation for the initial inclusion of §1004 in H.R. 7248 was adopted by *Islesboro*, 593 F.2d at 428, and *Romeo*, 600 F.2d at 584, citing Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 GEO. L. J. 49 (1976). The author had previously stated her disagreement with the scope of HEW's regulations at Congress's review hearings. 1975 Subcomm. Hearings, at 406-408.

precluding the interpretation that the right existed. *Cannon*, 441 U.S. at 713-16, n.50-52. Because the real degree of importance which the House may have attached to § 1004 is not determinable, the retreat from the limiting language must be taken at face value as an agreement that no such limitation should apply.

B. *Post-Enactment Consideration by Congress of Title IX and the HEW Regulations.*

Congress's consideration of Title IX did not stop with the enactment of the Education Amendments of 1972. One month after Title IX was passed, Senator Bayh entered a summary of the statute into the record. 118 Cong. Rec. 24683-85 (1972). This analysis, which is consistent with Senator Bayh's pre-enactment summaries of the legislation, stated that

> Title VI also specifically excludes *employment* from coverage (except where the primary objective of the federal aid is to provide employment). There is no similar exemption for employment in the sex discrimination provisions relating to federally assisted education programs.

118 Cong. Rec. 24684 n.1 (1972) (emphasis is original).

Pursuant to the authorization stated in § 902 of Title IX, HEW completed formal rulemaking and promulgated regulations to effectuate the prohibition stated in § 901 against sex discrimination by educational institutions which receive federal funds. HEW submitted its final Title IX regulations to both Houses of Congress as required by Section 431(d)(1) of the General Education Provisions Act, ("GEPA") 20 U.S.C. § 1232(d)(1), which was made applicable to Title IX by Section 431(f) of that Act, 20 U.S.C. § 1232(f). This review statute provided that such final regulations would become effective after forty-five days unless

Congress passed a concurrent resolution within that period to keep the regulations from taking effect. The standard for Congressional review was whether "the final regulation is inconsistent with the Act from which it derives its authority." 20 U.S.C. § 1232(d)(1). During the six days of hearings conducted by the House to review the Title IX regulations, 1975 Subcomm. Hearings, *supra*, then-Secretary of Education Weinberger called attention to the inclusion in the regulations of provisions prohibiting sex discrimination in the employment practices of covered recipients of federal aid. *Id.* at 436-438, 465-466. Most witnesses who commented on the coverage of employment supported the inclusion of Subpart E of the regulations. See, *e.g.*, *id.* 154-55 (Statement of Representative Carr); 164 (testimony of Representative Mink); 173 (testimony of Senator Bayh); 329 (statement of Dr. Bernice Sandler, Association of American Colleges). A resolution of disapproval was reported out to the full committee, but the areas to which objection was made did not include the coverage of employment practices. 93 H.R. Con. Res. 330 (94th Cong. 1st Sess. (1975)), reprinted in Hearing on House Concurrent Resolution 330 (Title IX Regulation) before the Subcomm. on Equal Opportunities of the House Comm. on Education and Labor, 94th Cong. 1st. Sess (1975).

In the Senate review, Senator Helms voiced disagreement with the regulations covering employment when he introduced a resolution proposing blanket disapproval of the Title IX regulations. 121 Cong. Rec. 17301 (1975). His resolution did not advance beyond committee.

Neither house of Congress disapproved any part of the Title IX regulations. This failure to act has some significance, *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 14-16 (1941), because the regulations became effective four months before Section 431(d) of the GEPA, 20 U.S.C. § 1232(d)(1), was amended to provide that the failure to adopt a concurrent resolution disapproving a final regulation should not

be construed as approval or as a finding of consistency with its authorizing statute.[36]

Congress's failure to disapprove the employment regulations should be read in the context of other Congressional considerations of Title IX after its enactment. Congress has amended § 901 of Title IX in several respects since 1972 without adding any restrictions on coverage of employment. Both of these amendments took place after Congress was made aware, by the promulgation of proposed regulations and submission to it of the final Title IX regulations, of HEW's intention to regulate employment. Subsection 1681(a)(6) (exemption of social organizations) was added in 1974. Pub. L. No. 93-568, § 3(a), 88 Stat. 1862 (1974), 20 U.S.C. § 1681(a)(6). Subsections 1681(a)(7)-(9) (exemptions of single-sex conferences, activities and beauty pageants) were added in 1976. Pub. L. No. 94-482, Title IV, § 412(a), 90 Stat. 2234 (1976), 20 U.S.C. §§ 1681 (a)(7)-(9). By contrast, attempts to limit the employment coverage of Title IX have not progressed beyond their introduction by individual members of Congress. In 1975 Senator Helms introduced a bill which proposed that Title IX be amended to state that "[n]othing in [Section 901 of Title IX] shall apply to any employees of any educational institution subject to this title." S-2146, 94th Cong., 1st Sess; 121 Cong. Rec. 23845-23847 (1975). A year later, Senator McClure proposed to restrict Section 901 to the "curriculum or graduation requirements of the institutions" receiving federal financial assistance. 122 Cong. Rec. 28136 (1976). In the course of successful opposition to this bill, Sen. Bayh stated:

> The impact of this amendment is enormous—it would exempt those areas of traditional discrimination against women that [were] the reason for the Congres-

[36] The Title IX regulations became effective on July 21, 1975, 45 C.F.R. §86.1. The effective date of the amendment of §431(d)(1) of the GEPA was November 25, 1975.

> sional enactment of Title IX. These areas would include scholarship aid, employment and employment benefits and extracurricular activities such as athletics.

122 Cong. Rec. 28144 (1976).[37]

Opposition to the application of § 901 to employment practices and objections to Subpart E of HEW's regulations were certainly brought to the attention of Congress, which has amended § 901 in other respects when it disagreed with HEW's interpretation of the statute. Under these circumstances, any doubts concerning the purpose of Congress at the time it enacted § 901 in 1972 should be resolved in favor of inclusion of employment.

III.

The Existence of Other Remedies for Sex Discrimination Against Employees in Federally-Funded Educational Programs in No Way Determines the Scope of §901 or the Validity of Subpart E Regulations.

The petitioners urge that the availability of Title VII and Equal Pay Act remedies to redress sex discrimination in employment in federally-assisted programs is a reason for construing § 901 as excluding coverage of employment. Those courts of appeals which have held contrary to the court below subscribe, whether expressly or implicitly, to this erroneous view. The First Circuit is *Islesboro*, 593 F.2d at 428, relied on the observation that the other sections of the House and Senate bills provided for amendment of Title VII and the Equal Pay Act to cover employment discrimination on the basis of sex in educational programs, implying that it was therefore unnecessary to construe § 901 as regulating employment. The courts in *St.*

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[37] This statement helps negate the theory that Senator Bayh intended only the amendments to Title VII and the Equal Pay Act to apply to employment practices of educational institutions.

Louis, 597 2d at 121, and *Seattle University,* 621 F.2d at 992, merely adopted this reasoning.

At least, these courts have seen the initial inclusion of the proposed amendments of Title VII and the Equal Pay Act in the same bill as reason to regard all legislative comments relating to employment as pertaining to provisions other than § 901.[38] The assumption that Congress had the purpose of restricting regulation of employment discrimination to these amendments of existing statutes is unsupported by the legislative history.

Nothing in the debates of either the Senate or the House of Representatives suggests that Congress meant such statutes to be the exclusive sources of remedy for employment dicrimination by those employers which are recipients of federal funds. Neither the floor debates nor the conference committee report reveals any concern for the possibility of, for example, duplicative investigations or multiple complaints. On the contrary, the amendments of both Title VII and the Equal Pay Act reveal a willingness to employ more than one statutory scheme to address this issue.

As the Second Circuit correctly observed *North Haven II,* 629 F.2d 784, (Pet. App. 46A-47A), overlapping jurisdiction in the area of employment discrimination is well recognized, and exclusive jurisdiction is not implied unless stated. See *Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454, 459 (1975); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 48-49 (1974).

Legislative enactments in the area of discrimination have long demonstrated a general intent to accord parallel or overlapping remedies. *Alexander* v. *Gardner-Denver Co.,* 415 U.S. at 47. The differences in remedies and procedures

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[38] The *Islesboro* court was so committed to its view that coverage of employment "was reserved for the amended Title VII and Equal Pay Act," 593 F.2d at 428, that it discounted Senator Bayh's remarks to the contrary as "the product of imprecision of oral discussion." *Id.*

among statutes prohibiting discrimination constitute valuable choices provided by Congress. *Johnson* v. *Railway Express Agency*, 421 U.S. at 461. The existence of more complete remedies and administrative assistance was seen as a reason for recognizing the application of Title VII to claims also amenable to private causes of action under § 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981. *Johnson* v. *Railway Express Agency*, 421 U.S. at 460.

As this Court observed in *Cannon*, 441 U.S. at 711, the fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section unless there is evidence that Congress meant to exclude the remedy. The availability of administrative enforcement by HEW to prevent and redress sex discrimination in employment is also confirmed by the elimination of the limiting language of §604 of Title VI.

The grant by Congress in §902 of comprehensive regulatory authority to HEW and other federal agencies providing financial assistance recognized their skill and expertise in analyzing discriminatory conduct which, though most obviously directed at employees, was symptomatic of general discrimination also affecting students. For example, HEW might be expected, in response to a complaint of exclusion of female teachers from a federally-assisted auto mechanics program, to suspect that female students might be discouraged from joining the program. The greater likelihood that adult employees would recognize discrimination—and have the skills and continuity of involvement with the program to report it—would enhance the granting agency's ability to discover and remedy the discrimination against others.

The current proposal by the Department of Education to refer some Title IX employment discrimination com-

plaints to the EEOC[39] confirms this interpretation. The Department of Education would retain investigatory and regulatory jurisdiction over all complaints which involve "systemic discrimination," that is, employment discrimination which is part of pervasive or structural discrimination in a program. It would refer to the EEOC those complaints which involve employment discrimination of the same type routinely handled by the EEOC. This referral scheme would insure the Department of Education of an opportunity to review all complaints of employment discrimination to ascertain whether there may be systemic discrimination in the program from which the complaint originates. The granting agency under this proposal would

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[39] The proposed procedure is as follows:

§..... 6 Processing of complaints of Employment Discrimination

• • • •

(c) A federal agency may refer a complaint of individual acts of employment discrimination covered by Titles VI or IX and Title VII, the Age Discrimination in Employment Act or the Equal Pay Act, *i.e.*, a joint complaint, to the appropriate EEOC field office. As a general rule, joint complaints of individual acts of employment discrimination should be referred to the EEOC.

(d) Joint complaints of systemic acts of employment discrimination should ordinarily be retained by the federal agency. If the agency refers such a complaint to the EEOC, the EEOC may limit its investigation to allegations which directly affect the charging party.

(e) Where a joint complaint alleges discrimination in employment and in other procedures of a recipient, only the allegations of employment discrimination may be referred to the EEOC under the joint regulation. Allegations of discrimination in activities other than employment shall be handled under the agency's own investigation procedures. The agency and the EEOC shall coordinate the investigation of such "mixed" complaints, including, but not necessarily limited to, the initiation of joint or simultaneous investigations.

46 Fed. Reg. 27397-27398 (1981).

also retain authority to apply sanctions beyond those available to the EEOC, including termination of funds.[40]

The Second Circuit correctly observed that fund termination as authorized by §902 of Title IX is a potent sanction to deter and remedy sex discrimination against employees of federally-funded programs, *North Haven II*, 629 F.2d at 785. The availability of Title VII and the Equal Pay Act to provide direct remedies to an injured employee in no way diminishes the validity of regulations which enable HEW to investigate and identify situations which involve the recipients of federal funds. As to them, this remedy is authorized and appropriate to fulfillment of Congress's purposes in enacting §901.

A Title VII or Equal Pay Act complaint would not usually come to the attention of HEW. The EEOC, which is charged with investigating Title VII complaints, 42 U.S.C. 2000e-5, has jurisdiction to remedy only employment practices, and not any other discriminatory practices which may exist in the same program. It is in this regard that the Second Circuit accurately characterized the sanctions available under Title VII and the Equal Pay Act as "piecemeal," 629 F.2d at 785. As was the case in *Alexander-Gardner Denver*, 415 U.S. at 50, "the relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each."

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[40] §..... 7

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(b) If the referring agency determines that the recipient has violated any applicable civil rights provision(s) which the agency has a responsibility to enforce, the agency shall so notify the recipient and determine whether further efforts to obtain voluntary compliance are warranted . . . If the deferring agency determines that further efforts to obtain voluntary compliance are not warranted or if such further efforts fail, the agency shall initiate appropriate enforcement proceedings under its own regulations.

46 Fed. Reg. at 27398 (1981).

The standard for review of administrative regulation is not whether the Congressional purpose may be achieved without them but whether the regulations are reasonably related to that purpose.

As this Court stated in *Udall* v. *Tallman*, 380 U.S. at 16, citing *Unemployment Comm'n.* v. *Aragon*, 329 U.S. 143, 153 (1946):

> [T]o sustain the [enforcing agency's] application of [a] statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.

The amendments of Title VII and the Equal Pay Act do not preclude the separate purpose of avoiding subsidies to institutions which discriminate on the basis of sex in employment practices, especially since there is no evidence of a purpose to create exclusive jurisdiction under these earlier statutes.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Second Circuit should be upheld.

Respectfully submitted,

BEVERLY J. HODGSON
KOSKOFF, KOSKOFF & BIEDER, P.C.
55 Chapel Street
Bridgeport, CT 06604
(203) 336-4421

Counsel for Respondent
Linda Potz

LINDA POTZ

By .....
BEVERLY J. HODGSON

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No. 80-986

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE NORTH HAVEN BOARD OF EDUCATION, PETITIONER

v.

TERREL H. BELL, ET AL.

THE TRUMBULL BOARD OF EDUCATION, PETITIONER

v.

UNITED STATES DEPARTMENT OF EDUCATION AND LINDA POTZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

BRIAN K. LANDSBERG
MARIE E. KLIMESZ
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, prohibits sex discrimination in employment in the federally assisted education programs of school districts and educational institutions.

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BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20A-48A-2) is reported at 629 F.2d 773. The opinions of the district court in *North Haven* (Pet. App. 51A-75A) and *Trumbull* (Pet. App. 76A-93A) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1980. A petition for rehearing was denied on October 24, 1980 (Pet. App. 49A-50A). The petition for a writ of certiorari was filed on December 16, 1980, and was granted on February 23, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. Sections 901(a) and 902 of the Education Amendments of 1972, 20 U.S.C. 1681(a) and 1682, are set forth at pages 1A-8A of the appendix to the petition.

2. Two pertinent regulations of the Department of Education, 34 C.F.R. 106.51 and 106.57, are set forth, respectively, at pages 8A-11A and 15A-17A of the appendix to the petition. A third pertinent regulation, 34 C.F.R. 106.11, provides:

> Except as provided in this subpart [Subpart B-Coverage], this Part [106] applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.[1]

STATEMENT

Petitioners are two Connecticut school districts which brought suits to challenge the authority of the Department of Health, Education, and Welfare (HEW)[2] to issue regulations prohibiting sex discrimination in the employment practices of educational institutions operat-

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[1] At the time these suits were brought, these regulations appeared at 45 C.F.R. 86.11, 86.51 and 86.57 (1977), respectively. They were recodified on May 9, 1980, in connection with the establishment of the Department of Education, 45 Fed. Reg. 30802, 30958, 30962-30964 (1980) (see note 2, *infra*). In both codifications, the employment practices regulations (45 C.F.R. 86.51 *et seq.* (1977) and 34 C.F.R. 106.51 *et seq.*) are designated as "Subpart E" of the Title IX regulations, and they are sometimes referred to by that designation.

[2] The functions of HEW under Title IX of the Education Amendments of 1972 were transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678. In the court of appeals, the Department of Education and the Secretary of Education were substituted as appellants in place of the Department and the Secretary of HEW. Because all of the relevant actions in this case were taken by HEW prior to the reorganization, it will be necessary to refer to that agency as well as the Department of Education in this brief.

ing federally assisted education programs and activities (Pet. App. 22A-25A).

1.a. The North Haven Board of Education (North Haven) receives federal financial assistance in support of its education programs and activities and, since the 1975-1976 school year, has used a substantial portion of that assistance to pay salaries of its employees (Pet. App. 23A). As a recipient of federal financial assistance, North Haven is subject to the provisions of Title IX and to authorized implementing regulations promulgated by the federal departments and agencies through which it receives such assistance (*ibid.*).

Section 901 of Title IX, 20 U.S.C. 1681, provides in pertinent part that, with certain enumerated exceptions, "[n]o person * * * shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Section 902 of Title IX, 20 U.S.C. 1682, provides that each federal department or agency empowered to grant federal financial assistance by way of grant, loan, or contract is authorized to promulgate regulations to effectuate Section 901. It also provides that compliance with "any requirement" thereby adopted may be enforced by termination of financial assistance or the refusal to grant it in the first instance. Such action can be taken, however, only after a finding of noncompliance is made on the record after opportunity for a hearing, and the termination or refusal to grant aid must, *inter alia*, be "limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found." *Ibid.*

To implement Section 901, HEW issued regulations that, *inter alia*, prohibit sex discrimination in the employment practices of federally assisted education programs and activities. 45 C.F.R. 86.11 and 86.51 *et seq.* (1977) (now codified at 34 C.F.R. 106.11 and 106.51 *et seq.*).

On January 10, 1978, HEW notified North Haven that it had received a complaint alleging that the school district was in violation of Title IX in its hiring policies and in the terms and conditions of employment and re-

questing that North Haven provide information concerning its policies on hiring, leaves of absence, seniority, and tenure (Pet. App. 52A-53A; A. 9-11).[3] North Haven refused to supply the requested information, asserting, among other things, that HEW had no authority to regulate employment practices under Title IX (A. 5, 14). HEW then notified North Haven that, because of its refusal to provide information, the matter had been referred to the appropriate office for possible enforcement proceedings (Pet. App. 53A-54A; A. 16).[4]

North Haven thereupon instituted the present action against the Secretary of HEW and certain regional HEW officials seeking a declaratory judgment that HEW's Title IX employment practices regulations exceeded the authority conferred on the department by the statute (A. 2-8). It also sought to enjoin HEW from attempting to terminate any federal financial assistance to the school district on the grounds of alleged noncompliance with the employment regulations (A. 8). The parties filed cross-motions for summary judgment, and on April 24, 1979, the court granted North Haven's motion. Adopting the reasoning of several district courts and of the court of appeals in *Islesboro School Committee* v. *Califano*, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979), the court held that the prohibitions of Title IX do not apply to employment practices (Pet. App. 51A-72A).

Summarizing the conclusions and quoting from the opinion of the district court in *Romeo Community Schools* v. *HEW*, 438 F.Supp. 1021 (E.D. Mich. 1977), aff'd, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979), the court concluded (Pet. App. 64A) that the language

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[3] "A." refers to the Appendix accompanying respondents' briefs, which is filed in lieu of a joint appendix in accordance with this Court's order of June 30, 1981.

[4] Financial assistance cannot be terminated, however, without affording the opportunity for a hearing before an Administrative Law Judge, who makes a recommended decision that is subject to several levels of review, including, ultimately, judicial review. See 34 C.F.R. 106.71, 34 C.F.R. 100.6-100.11, and 34 C.F.R. Part 101.

of Section 901 of Title IX prohibits sex discrimination only against students and that "[t]eachers * * * are hard pressed to fit themselves within the plain meaning of § 1681's prohibitory language, general as it may appear on its face." The court recognized that while Title IX is patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (prohibiting racial discrimination in federally assisted programs), it included no counterpart to Section 604 of Title VI, which excludes employment generally from the coverage of that title. The court reasoned, however, that such a provision was omitted from Title IX because it would have been inconsistent with other portions of the Title IX legislative package rather than because Congress intended that employment be covered under Section 901 (Pet. App. 61A-62A).

The court found further support for its reading of Section 901 in its conclusion that Congress could not have intended to provide for termination of federal financial assistance to a school district where there was discrimination against teachers but not direct discrimination against students (Pet. App. 65A-66A). Finally, it concluded that the Section 902 provision limiting the effect of termination of assistance to "the particular program, or part thereof, in which * * * noncompliance has been * * * found" is inconsistent with agency regulation of employment practices, because such practices are not "program-specific" (Pet. App. 66A-67A).

The court's judgment declared the Title IX employment practices regulations invalid in their entirety and enjoined HEW and its employees from terminating or attempting to terminate federal financial assistance "for any alleged noncompliance with said regulations" (Pet. App. 71A-72A).

b. Like North Haven, the Trumbull Board of Education (Trumbull) receives federal financial assistance in support of its education programs and activities and is, therefore, subject to the provisions of Title IX and its implementing regulations (Pet. App. 24A; A. 29-30). HEW

investigated a complaint, filed under Title IX by respondent Linda Potz, a former guidance counselor in the Trumbull school district, alleging that Trumbull had discriminated against her on the basis of sex in job assignments, working conditions, and the non-renewal of her contract (Pet. App. 24A). On September 20, 1978, HEW notified Trumbull that it had concluded that the school district was in violation of Title IX and requested that corrective action be taken (Pet. App. 25A; A. 33-42).[5]

Trumbull declined to take the corrective action requested by HEW and instead, on October 18, 1978, filed this action seeking a declaration that HEW's Title IX employment regulations are invalid and an injunction forbidding HEW from attempting to enforce those regulations against the school district (Pet. App. 25A). The district court granted Trumbull's motion for summary judgment on May 24, 1979, for the reasons set forth in its decision in *North Haven* (Pet. App. 76A).[6]

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[5] Specifically, HEW found that Potz was required to perform tasks such as typing and running errands, which were not part of her duties as a guidance counselor and which male counselors were not required to perform, that her office was moved to a smaller, poorly heated and less comfortable space, in the gymnasium, away from other counselors, and that she was asked to change a report showing that she had seen some 150 students in a given week because the number was much higher than the number seen by her male colleagues. Finally, HEW found that Potz's sex was the motivating factor in the school district's decision not to renew her contract (Pet. App. 24A-25A; A. 37-42).

[6] Because the court granted summary judgment before respondent Potz had an opportunity to respond to Trumbull's motion, Potz filed a motion to set aside the judgment and a cross-motion for summary judgment (Pet. App. 79A; A. 50-51). On September 13, 1979, the district court denied both of Potz's motions and granted Trumbull's motion to conform the final judgment to the relief portion of the judgment granted in *North Haven* (page 5, *supra*).

The court had also denied an earlier motion by Potz to compel Trumbull to answer interrogatories regarding the amounts and types of federal financial assistance its school district received (A. 49). Trumbull had objected to the interrogatories on the ground that the decision in *North Haven* declaring the employment

2. On respondents' appeals, the court of appeals consolidated the cases and reversed the judgments of the district court (Pet. App. 20A-48A-2). The court concluded that the legislative history and the purpose of the statute supported HEW's interpretation of its language as prohibiting employment discrimination (Pet. App. 32A). The court noted that the remarks of the sponsor of the portion of the bill that became what is now known as Title IX indicated an intention to prohibit employment discrimination through Section 901 of Title IX, as well as through amendments to Title VII of the Civil Rights Act of 1964 and the Equal Pay Act, 29 U.S.C. 206(d) (Pet. App. 33A-41A). The court also relied upon conference committee action deleting a provision of the House bill similar to that contained in Section 604 of Title VI of the Civil Rights Act of 1964, which would have excluded most employment practices from the operation of the statute; it disagreed with the view of other courts of appeals that the deletion was made simply to avoid an internal inconsistency in the bill (Pet. App. 42A-43A).

The court found it "not without significance" (Pet. App. 43A) that Congress undertook a statutorily mandated review of the regulations and failed "to adopt resolutions, *along with bills and amendments*, specifically designed to exempt employment from HEW regulation after hearing arguments on both sides" (Pet. App. 46A; emphasis in original). The court further concluded that the fact that there is some overlap of jurisdiction in employment discrimination means only that Congress intended both to give HEW the termination remedy and to provide additional remedies for individual employees under Title VII and the Equal Pay Act (Pet. App. 46A-47A).

The court of appeals rejected the argument that Congress could not have intended to penalize students because

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practices regulations invalid was dispositive of the case and that the questions regarding federal financial assistance were "irrelevant" (A. 43-44).

of discrimination against faculty members, observing (Pet. App. 47A) that the termination sanction would have this broad reach even if employment practices were not covered, since it can be used to terminate funds for a program benefiting many students even where the discrimination affects only a few. Given the "grave congressional concern" over sex discrimination in educational employment, the court concluded (*ibid.*) that Congress intended HEW to have the same authority to combat that kind of discrimination as it has to combat sex discrimination involving students.

Finally, the court concluded that Section 902, limiting the effect of HEW's power to terminate funds to "the particular program or part thereof, in which * * * noncompliance [with the regulations] has been * * * found," is not a limitation on the power to prohibit employment discrimination by broad regulations (Pet. App. 48A-1 to 48A-2).[7]

SUMMARY OF ARGUMENT

1. Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), provides in pertinent part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance * * *." This broad language, on its face, encompasses employment discrimination, as well as discrimination against students or recipients of research grants. Discriminatory hiring practices maintained by a university or school system, for example, may exclude job applicants from "participation" in education programs that receive federal financial assistance; and

[7] Because of its conclusion that the statute covers employment, the court did not reach the question whether, absent such independent employment coverage, HEW would have authority to issue regulations prohibiting sex discrimination against employees to the extent that such discrimination also constitutes discrimination against students (Pet. App. 48A-2).

employees in federally assisted education programs who are discriminated against in pay or working conditions are "subjected to discrimination under" the programs in which they work.

Congress created certain exceptions to that broad language, but the exemption that petitioners read into the statute—an exemption for employment practices except where a primary objective of the federal financial assistance is to provide employment—was not one of them. Where Congress has specified exceptions to a broad basic provision, it is inappropriate to read other, unspecified exceptions into the statute.

2. The legislative history of Title IX confirms a reading of the statute that encompasses employment discrimination without the "employment objective" limitation. Sections 901 and 902 of Title IX are generally patterned on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, aimed at discrimination on the basis of race, color, or national origin in federally assisted programs. In that statute, Congress employed language like that in Section 901 of Title IX, but it added a provision (Section 604, 42 U.S.C. 2000d-3) excluding from its coverage "employment practice[s] * * * except where a primary objective of the Federal financial assistance is to provide employment."

A provision like Section 604 was included in the House version of the bill that went to the conference committee from which the final legislation emerged. It was not included in the Senate version, an amendment sponsored by Senator Bayh. Senator Bayh's description of his amendment makes it clear that he intended to give to HEW, as an agency that granted assistance to education programs, jurisdiction over employment discrimination in any program that it assisted. While his amendment, like the House bill, also contained provisions for amending Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Pay Act, 29 U.S.C. 206(d), so as to extend their coverage to all educational employees, Senator Bayh carefully distinguished between the portions of his amendment that related to those two stat-

utes and the portion that prohibited discrimination on the basis of sex in education programs or activities receiving federal financial assistance. The latter portion, he stated unequivocally, would cover, *inter alia*, "employment practices for faculty and administrators" (118 Cong. Rec. 5807 (1972)). In other statements and in colloquies with Senator Pell, he reiterated the point.

Against this background, the description in the conference report of the employment coverage limitation in the House bill, followed by the simple statement that the House receded from that provision, is properly construed as a statement that the broader coverage of Senator Bayh's amendment was the final congressional choice.

Contrary to petitioners' contentions, the legislative history of Title VI does not suggest that Section 901 itself includes the employment coverage limitation described in the omitted provision. Whether Section 604 was added to Title VI to clarify the basic prohibition or to carve out an exception, it was clear that any future Congress wishing to enact a statute barring a different kind of discrimination but having essentially the same scope as Title VI could assure parallel coverage only by enacting counterparts to both the basic prohibition and the provision limiting employment coverage.

3. In the three years following the enactment of Title IX, HEW, acting pursuant to Section 902 of the statute, 20 U.S.C. 1682, engaged in notice and comment rulemaking to develop regulations effectuating Section 901 of Title IX. As required by statute, the regulations were submitted to President Ford for his signature and then transmitted to the House and Senate for review. The regulations became effective 45 days thereafter by virtue of the failure of Congress to pass a concurrent resolution of disapproval.

Although Congress provided in a subsequent statute that the failure to pass such a resolution may not be relied upon as evidence that Congress approved the regulations, the fact remains that through that review process,

the regulations were brought to the attention of Congress. That history gives special significance to the fact that Congress thereafter amended Section 901 of Title IX, but did not act upon proposals of two Senators to amend that same section so as to foreclose HEW's construction of its employment practices coverage. Where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979), quoting *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 487-489 (1940).

4. Title IX is a "program-specific" statute in two respects. Section 901 prohibits discrimination on the basis of sex only in education programs and activities receiving federal financial assistance, and Section 902 requires that any termination of such assistance under the title be limited to the "particular program, or part thereof" in which noncompliance with the implementing regulations is found. Coverage of employment practices is as consistent with the program-specific character of the statute as coverage of student admissions. Both employment policies and admissions policies may, for example, apply broadly throughout a university or may be limited to a particular graduate school or department of that graduate school, and fund termination could be limited to the part of any federally assisted education program in which discrimination is found.

Complex questions may arise concerning the definition of education program in a particular case. Such questions are not presented here, however. In *North Haven* the complaint that HEW sought to investigate concerned leave and seniority policies applied to teachers, and the Board of Education conceded that federal funds were used to pay teachers' salaries. In *Trumbull*, the Board refused to answer interrogatories concerning the amounts

and uses of its federal financial assistance, asserting that the questions were irrelevant because the district court's decision in *North Haven*, barring the termination of assistance for *any* noncompliance with the HEW regulations, was dispositive of the case. On these records, the authority of the Department of Education under Title IX to investigate or remedy discrimination that exists only in programs not receiving federal financial assistance is not at issue.

ARGUMENT

SECTION 901 OF TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 PROHIBITS SEX DISCRIMINATION IN EMPLOYMENT IN THE FEDERALLY ASSISTED EDUCATION PROGRAMS OF SCHOOL DISTRICTS AND EDUCATIONAL INSTITUTIONS

The two basic objectives of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, are to assure that federal funds do not support education programs and activities marked by discrimination on the basis of sex, and to provide individual citizens effective protection against such discriminatory practices. *Cannon* v. *University of Chicago*, 441 U.S. 677, 704 (1979). Congress sought to address comprehensively the "persistent patterns of discrimination against women in the academic world" (118 Cong. Rec. 5804 (1972) (remarks of Senator Bayh)) and, in particular, to eliminate discrimination against "those women who choose to make education their life work." *Id.* at 5804-5805.

Petitioners assert that Congress addressed this problem of discrimination in educational institutions *solely* through an amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000-e *et seq.* (hereinafter "Title VII"), and an extension of the Equal Pay Act, 29 U.S.C. 206(d), to those employed in an executive, administrative, or professional capacity. They accordingly contend (Pet. Br. 22) that the prohibition against discrimination on the basis of sex embodied in Section 901 of Title

IX, as finally enacted, reaches only "beneficiaries of federal financial assistance," narrowly defined so as to exclude "employees per se." Under this reading, school districts and universities are free to discriminate, on the basis of sex, against persons employed in their federally assisted education programs and activities, so long as the federal assistance was not specifically intended to benefit those employees. Thus an employee who was the direct recipient of a federal research grant or contract would be protected by Section 901 against discrimination on the basis of sex, but the faculty and staff of a federally assisted education program or activity would not be within the statute's coverage even if their salaries are paid from federal funds, unless they were direct recipients of such grants or contracts.

While that reading has been adopted by four appellate courts,[8] we believe that the court of appeals in this case, which carefully considered the views of the panels in those circuits, has correctly determined (Pet. App. 46A-48A-1) that Congress intended to cover employment practices through Section 901. Congress thereby supplemented the employment discrimination remedies of Title VII and the Equal Pay Act with a federal administrative remedy, including fund termination, where employment discrimi-

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[8] *Seattle University* v. *HEW*, 621 F.2d 992 (9th Cir. 1980), cert. granted, No. 80-493 (Dec. 1, 1980); *Romeo Community Schools* v. *HEW*, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979); *Junior College District of St. Louis* v. *Califano*, 597 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972 (1979); *Islesboro School Committee* v. *Califano*, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979).

The Fifth Circuit, in *Dougherty County School System* v. *Harris*, 622 F.2d 735 (1980), petition for cert. pending, No. 80-1023, held that the employment practices regulations exceeded the Secretary of HEW's authority under Title IX, but it rejected the decisions of those four courts as resting on "a rationale so broad that they would inhibit a narrower, yet to us apparently valid, exercise of the Secretary's authority" with respect to employment discrimination in federally assisted education programs. 622 F.2d at 737. See note 36, *infra*.

nation on the basis of sex in federally assisted education programs is concerned. This reading of the statute is well grounded in the broad language of Section 901 and is confirmed by the legislative history of Title IX.

A. The Statutory Language Expressly Applies to All Victims of Sex Discrimination in Education Programs and Activities Receiving Federal Financial Assistance

Section 901(a) of Title IX, 20 U.S.C. 1681(a), provides, in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *

The words "[n]o person" do not alone suggest any limitation. Facially included within this unqualified phrase are students, teachers, staff personnel and, presumably, other employees. The four courts of appeals that have concluded otherwise have construed the language as applying only to direct beneficiaries of particular grants, loans, or contracts, taking comfort in the fact that the quoted language does not expressly refer to employees.[9]

It is, however, not just those "denied the benefits" of an educational program who are protected under the Act. The Act also protects those "excluded from participation." No undue strain is required to apply this latter language to discriminatory hiring practices of school systems and educational institutions, since such practices may exclude applicants from participation in the education programs that benefit from federal financial assist-

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[9] See, *e.g.*, *Islesboro School Committee* v. *Califano*, *supra*, 593 F.2d at 426; *Junior College District of St. Louis* v. *Califano*, *supra*, 597 F.2d at 121. The Fifth Circuit, by contrast, found the language broad enough to reach "at least some employment practices." *Dougherty County School System* v. *Harris*, *supra*, 622 F.2d at 737-738.

ance. Similarly, those "subjected to discrimination under" the education programs or activities in which they work appear to fit within the statutory language, whether that discrimination pertains to pay, promotions, or other conditions of employment.

No language in Title IX states either expressly or by implication that employees are to be excluded from the coverage of the nondiscrimination provision. Indeed, while Title IX is generally modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (see *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-696 (1979)), it conspicuously omits any provision analogous to Section 604 of Title VI, 42 U.S.C. 2000d-3, which expressly excludes coverage of employment practices "except where a primary objective of the Federal financial assistance is to provide employment" (see discussion pages 16-33, *infra*). There are nine specific exemptions from the broad coverage of Section 901. Two of these (20 U.S.C. 1681(a)(3), exempting "[e]ducational institutions of religious organizations with contrary religious tenets," and 20 U.S.C. 1681(a)(4), exempting "[e]ducational institutions training individuals for military services or merchant marine"), exempt an entire class of institutions, presumably including their employment practices; but none of the exemptions otherwise suggests that employees working in federally assisted education programs are to be excluded from the protections of the statute. Where Congress has taken pains specifically to exempt certain areas from the basic coverage of a statute, courts should be especially hesitant to read unexpressed exemptions into the statute.

In sum, although it may be prudent—or even, as the court below concluded (Pet. App. 30A), necessary—to look beyond the statutory language at issue here, that language is entirely consistent with the view that the statute prohibits sex discrimination in employment in the federally assisted education programs of school districts and educational institutions, regardless of whether that

employment is a primary objective of the federal assistance.

B. The Legislative History of Title IX Shows that Congress Intended, through Section 901, to Prohibit Sex Discrimination in Employment in Federally Assisted Education Programs

Petitioners and the Equal Employment Advisory Council, as amicus curiae, strongly rely on the argument (Pet. Br. 26-46; EEAC Br. 8-11) that the exclusion of employment coverage from Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (hereinafter "Title VI"), was carried over into Title IX, notwithstanding the deletion from the final Title IX bill of what we, like the EEAC (EEAC Br. 7), shall refer to as "the Section 604 language." (See pages 33-34, note 24, *infra*, for the text of Sections 601 and 604 of Title VI, 42 U.S.C. 2000d and 2000d-3, the basic discrimination provision and the employment coverage limitation respectively.)

We agree with petitioners and the EEAC (1) that Title VI, which prohibits discrimination on the basis of race, color, or national origin in federally assisted programs, does not generally apply to employment practices "except where a primary objective of the Federal financial assistance is to provide employment";[10] (2) that the House versions of Title IX incorporated this limitation; and (3) that the statute as finally enacted was generally patterned on Title VI. We disagree with them, however, that these considerations warrant the conclusion that Section 901, as enacted, incorporates the employment coverage limitation. As we show in our discussion of the pertinent legislative history of Title VI (pages 33-36, *infra*), any Congress that thereafter desired to enact an

[10] Even Title VI, however, covers discrimination against members of school faculties where that discrimination affects students. See *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 881-886 (5th Cir. 1966), adopted en banc per curiam, 380 F.2d 385, cert. denied, 389 U.S. 840 (1967); 34 C.F.R. 100.3(c)(3).

antidiscrimination provision having the same scope as Title VI with respect to employment would be able to assure parallel coverage only by enacting counterparts to *both* Section 601 and Section 604. Moreover, the legislative history of Title IX itself indicates that the House was in no way insistent on maintaining the employment limitation. There was, accordingly, no obstacle to dropping it in conference, without elaborate explanation, in favor of the Senate version that contained no such limitation and that was described by its sponsor as encompassing such "aspects" of education programs as "faculty employment." 118 Cong. Rec. 5803 (1972) (remarks of Sen. Bayh).

1. *Origins of Title IX in the House of Representatives*

Title IX as finally enacted was part of a Senate bill, S. 659, 92d Cong., 2d Sess. (1972), added through an amendment sponsored by Senator Bayh (Amendment No. 874). 118 Cong. Rec. 5802, 5815 (1972). (See discussion, pages 21-28, *infra.*)

The first movement toward what became Title IX, however, came in 1970, when a special House subcommittee on education chaired by Representative Edith Green conducted hearings on discrimination against women in the field of education. *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970) (hereinafter "*1970 Hearings*"). The bill up for consideration during these hearings, Section 805 of H.R. 16098, 91st Cong., 2d Sess. (1970), would have, *inter alia*, (1) amended Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, so as to extend its prohibitions to discrimination on the ground of sex, (2) amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* so as to make it applicable to public school employees and educational employees generally and (3) amended Section 13(a) of the Fair Labor Standards Act, 29 U.S.C.

213(a), so as to make the Equal Pay Act (29 U.S.C. 206(d)) applicable to executive, administrative, and professional employees. *1970 Hearings* (Pt. 1) at 1, 8-9.

In the hearings on this bill, which never emerged from the House (see *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 695 n.16), discrimination against women employed in, or seeking employment in, the field of education was a prominent focus of much of the testimony. See, *e.g.*, *1970 Hearings* (Pt. 1) at 19, 128, 336; *1970 Hearings* (Pt. 2) at 657, 739, 742, 763-789. Because, as noted above, Title VI did not extend to employment practices except where employment was an objective of the federal financial assistance in question, the bill's fund termination remedy was of quite limited usefulness as a remedy for employment discrimination.

This was true also of H.R. 7248, 92d Cong., 1st Sess. (1971), introduced in the 92d Congress by Representative Green, among others, which contained, as part of its Title X, a separate prohibition against sex discrimination in federally assisted education programs and activities (Section 1001), together with a provision (Section 1004), virtually identical to the limitation of employment coverage in Section 604 of Title VI. 117 Cong. Rec. 9829 (1971); H.R. Rep. No. 92-554, 92d Cong., 1st Sess. 108 (1971).[11]

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[11] Section 1004 of Title X of H.R. 7248 provided:

> Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

As Representative O'Hara later explained in the hearings on the regulations drawn up by HEW to implement Title IX, he and others decided to draft a separate title rather than amend Title VI because of their fears that other, undesirable changes might be made to Title VI if it were opened up to amendment. *Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 409 (1975). He also explained (*id.* at 408-

None of those participating in the debate on H.R. 7248 in this session of Congress commented on Section 1004. Most of the opposition to the bill focused on constraints on undergraduate admissions (117 Cong. Rec. 39248-39261 (1971)) and, in particular, on an amendment proposed by Representative Erlenborn which, he explained, "would allow the effects of nondiscrimination in this title to apply to faculty, to employees, and to admission practices in the graduate schools * * * [but] would not apply the provision against sex discrimination in the case of undergraduate admissions" (*id.* at 39260). While this reference, and references by other representatives to sex discrimination in faculty employment (see, *e.g.*, *id.* at 39252 (remarks of Rep. Peyser, quoting from letter of Dartmouth president); *id.* at 39253 (remarks of Rep. Sullivan)) were probably directed to the provisions of the bill amending Title VII and the Equal Pay Act,[12] they suggest a general readiness to enact remedies for discrimination on the basis of sex in employment. This

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409), by reference to minutes of the committee that drafted the bill (*Minutes of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 9 (Sept. 30, 1971)), that H.R. 7248 was basically a mark-up of Title VI. Although he termed the inclusion of Section 1004 a "drafting error" (because it made no sense thus to limit employment coverage in a bill containing provisions that amended Title VII and the Equal Pay Act), it is evident that if the committee's intent was to retain the employment practices limitation on the fund termination remedy, its error was merely its failure to revise the section slightly so as to restrict its application to Section 1001, the basic discrimination prohibition governing federally assisted education programs and activities.

[12] We note, however, that Representative Smith, speaking in support of the Erlenborn amendment, quoted Section 1001 of Title X, the general prohibition against sex discrimination in federally assisted education programs and activities, described it as "the effective provision of Title X," and then stated that, as he understood the Erlenborn amendment, it would "exempt out of this title all undergraduate schools and then leave the prohibition against sex discrimination to apply to graduate education and faculty employment and salaries." 117 Cong. Rec. 39255 (1971).

would explain why the House conferees would feel free, in the 1972 conference with the Senate on S. 659, to forgo any insistence on the employment coverage limitation.[13]

Although H.R. 7248 was passed by the House, and the Senate had passed S. 659, its own version of the higher education bill, no legislation was agreed on by both houses in that session of Congress.[14] As we shall explain, an

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[13] As petitioners and the EEAC note (Pet. Br. 58-63; EEAC Br. 13), in the 1970 sex discrimination hearings before Representative Green's committee, the Department of Justice had proposed its own bill to combat sex discrimination in federally assisted education programs. It opposed the idea of merely adding the word "sex" to Title VI, and proposed, instead, a separate bill that, as Assistant Attorney General Jerris Leonard explained, "would not contain an exemption for employment practices." *1970 Hearings* at 678. See also *id.* at 686. While the Department's proposed bill expressly provided for employment coverage (*id.* at 690-691), Assistant Attorney General Leonard did not suggest in his testimony (*id.* at 677-690) that only through the use of such language could employment practices be covered. Hence it is inaccurate to state that "the Justice Department recognized that Section 601 [without the Section 604 language] did not include coverage of employees except with respect to federally subsidized jobs programs" (EEAC Br. 13) or that "the Justice Department opposed the present language of § 901" as not extending to employment discrimination (Pet. Br. 58).

What the House had originally rejected was the entire Justice Department approach, which would have covered employment discrimination on the basis of sex in federally assisted education programs but would have left untouched such discrimination in any educational institutions that received no federal funds, since the Department recommended against amending Title VII (*1970 Hearings* at 679). The House rejection of that approach cannot reasonably be viewed as evidencing an insistence on *retaining* the employment practices limitation in what later became Title IX.

[14] H.R. 7248 was amended in respects not here pertinent, passed by the House (117 Cong. Rec. 39354, 39374 (1971)), and laid on the table when S. 659, amended by substitution of the House language, was passed in lieu. 117 Cong. Rec. 39374 (1971). This bill was sent back to the Senate, referred to its Committee on Labor and Public Welfare, and reported back to the Senate with recommendations for further amendments. S. Rep. No. 92-604, 92d Cong., 2d Sess. 1-2 (1972).

amended version of S. 659, including what is now Title IX, was enacted in 1972, after the House agreed to accept Senate language that omitted any limitation on coverage of employment practices.

2. The Senate Amendments

S. 659, as reported out of the Senate Committee on Labor and Public Welfare on February 7, 1972, (now titled "The Education Amendments of 1972") did not contain any provision covering sex discrimination. S. Rep. No. 92-604, 92d Cong., 2d Sess. (1972). In the previous session, Senator Bayh had sought to add a sex discrimination provision to S. 659, designed to close the gap left by existing civil rights legislation, which allowed educational institutions to discriminate on the basis of sex. 117 Cong. Rec. 30156-30157 (1971). That amendment had been ruled nongermane, however, and thus did not come to a vote on the merits. 117 Cong. Rec. 30411-30415 (1971).

a. Senator Bayh's 1971 proposal had consisted of three parts: first "provisions * * * identical to those provided under title VI of the 1964 Civil Rights Act—forbidding discrimination in federally assisted programs—which does not presently include a prohibition on sex discrimination"; second, amendment of Titles IV and IX of the Civil Rights Act of 1964 to allow the Attorney General to bring, and to intervene in, suits against public schools which deny admission or equal protection of the laws on account of sex; and third, a study and recommendations for legislation by the Commissioner of Education on "equality of opportunity in higher education between the sexes." 117 Cong. Rec. 30156 (1971).[15]

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[15] Senator Bayh's amendment was first introduced on August 5, 1971; it was immediately laid on the table. 117 Cong. Rec. 30155 (1971). The amendment was reintroduced and debated the next day, when the Chair's ruling that it was nongermane was sustained. 117 Cong. Rec. 30403-30415 (1975).

Senator Bayh's amendment did not, however, contain any counterpart to the limitation on employment practices coverage in Title VI; and his suggestions that his amendment respecting sex discrimination in federally assisted education programs and activities was identical to the Title VI prohibition respecting discrimination on other grounds (*e.g.*, 117 Cong. Rec. 30156, 30408 (1971)) do not appear to reflect a view that his amendment would not cover employment discrimination. For in introducing the amendment, he stated (*id.* at 30155-30156):

> While over 50 percent of our population is female, there is no effective protection for them as they seek admission and employment in educational facilities. The antidiscrimination provisions of the Civil Rights Act of 1964 do not deal with sex discrimination by our institutions of higher learning. * * *
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> * * * * *
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> Today, women seeking employment in higher education face an array of obstacles almost as insuperable as those which used to face blacks. WEAL has compiled statistics indicating that Columbia University annually awards 24 percent of its doctorates to women, but that it has awarded 2 percent of its tenured faculty positions to females; and the last time the Department of Psychology at Berkeley hired a woman was in 1924. In short, just as in other professions an old axiom applies, the higher the rank, the fewer the women.

As petitioners and the EEAC have noted (Pet. Br. 63-64 n.14; EEAC Br. 16), immediately after Senator Bayh made his remarks, Senator McGovern introduced his own sex discrimination amendment, which expressly covered employment. 117 Cong. Rec. 30158, 30411 (1975). Senator McGovern did not, however, call his amendment up for action. Instead, he observed that he would support the "similar amendment" introduced by Senator Bayh. *Id.* at 30411. In making this announcement, Senator McGovern also observed the necessity for

such an amendment, in light of such disturbing statistics as, *inter alia*, "the fact that only 9 percent of America's college professors are women * * *." *Ibid.*[16]

b. On February 28, 1972, Senator Bayh introduced an expanded version of his 1971 amendment (now designated Amendment No. 874 and proposed as an additional "Title X" in S. 659). 118 Cong. Rec. 5802-5803. In introducing this amendment, he made plain his concern about employment discrimination on the basis of sex in the field of education, observing (*id.* at 5803) that "sex discrimination reaches into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales." He inserted into the record statistical tables showing, *inter alia*, the percentage of women in the various faculty ranks, from lecturer to professor, in institutions of higher learning (*id.* at 5804), and he expressed dismay at "the double standard the academic community has applied to those women who choose to make education their life work" (*id.* at 5804-5805).

In explaining the scope of his amendment, he stated (118 Cong. Rec. 5803 (1972)) (emphasis added):

> Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs and employment resulting from those programs. * * * More specifically, the heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such

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[16] As this Court has observed (*Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 693 n.14), Senator McGovern's amendment was "phrased quite differently," since, *inter alia*, it did not broadly prohibit discrimination on the basis of sex but gave "a simple directive to the Secretary of HEW" with respect to the award of government grants, contracts, loan guarantees and the like. Notwithstanding the significance of *that* difference in phrasing, however, Senator McGovern's emphasis on the small percentage of female college professors and his willingness to support Senator Bayh's amendment, suggest that he did not construe the Bayh amendment as excluding employment coverage.

> crucial aspects as admissions procedures, scholarships, and *faculty employment*, with limited exceptions. Enforcement powers include fund termination provisions—and appropriate safeguards—parallel to those found in Title VI of the 1964 Civil Rights Act. *Other important provisions* in the amendment would extend the equal employment opportunities provisions of Title VII of the 1964 Civil Rights Act to educational institutions, and extend the Equal Pay for Equal Work Act to include executive, administrative and professional women.

Contrary to the conclusion of the First Circuit in *Islesboro School Committee* v. *Califano*, *supra*, 593 F.2d at 428, on which petitioners rely (Pet. Br. 68-69), Senator Bayh's references to employment discrimination cannot be dismissed as simply references to those provisions of his amendment that would expand Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. First, as the court of appeals below observed (Pet. App. 35A; emphasis in original): "Senator Bayh in his quoted remarks quite clearly referred to 'faculty employment' in conjunction with the basic prohibition of his amendment and *then* referred to the '[o]ther important provisions' dealing with Title VII and the Equal Pay Act." Second, as we have noted (pages 21-22, *supra*), Senator Bayh had evidently contemplated employment discrimination coverage when he had introduced his 1971 amendment—before he added the provisions amending Title VII and the Equal Pay Act.[17]

Perhaps an even clearer expression of the intended employment practices coverage of Senator Bayh's 1972

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[17] The EEAC thus draws the wrong conclusion (EEAC Br. 17-18) from Senator Bayh's statement (118 Cong. Rec. 5808 (1972)) that his 1972 amendment represented a "comprehensive approach which incorporates not only the key provisions of my earlier amendment, but the strongest points of the antidiscrimination amendments approved by the House." He had originally contemplated employment coverage in a bill based on Title VI, without its employment practices limitation, and he added to this the House amendments of Title VII and the Equal Pay Act.

amendment came in his summary of what his amendment was designed to accomplish and by what means. 118 Cong. Rec. 5806-5808 (1972). The Senator divided his summary into separate commentaries on what he termed different "portion[s] of the amendment." His explanations of the first two portions appear in the Congressional Record under the headings "A. Prohibition of Sex Discrimination in Federally Funded Education Programs" and "B. Prohibition of Education-Related Employment Discrimination." *Id.* at 5807. In the first part of his summary he describes the basic "prohibition and enforcement provisions which generally parallel the provisions of Title VI [of the Civil Rights Act of 1964]" (*ibid.*); and in the second part he describes the amendments to Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. Despite the contrary inference that might be drawn from the headings alone, Senator Bayh's description of the first portion of his amendment shows that Section 901 of Title IX was intended to cover employment discrimination in education programs that benefit from federal financial assistance.[18] There, after describing the mechanics of the amendment (the authority conferred on HEW to issue regulations, to permit cer-

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[18] Part "A" of the summary begins with the statement, "Central to my amendment are sections 1001-1005, which would prohibit discrimination on the basis of sex in federally funded education programs." *Id.* at 5807. The reference to "sections 1001-1005" is evidently a misprint for "sections 1001-1004," since Section 1005 is the amendment to Title VII, which is not limited to "federally funded education programs" and which, as noted, is discussed in Part B of the summary, along with the Equal Pay Act amendment. As the court of appeals below observed (Pet. App. 38A n.11), this "was simply an oversight" on Senator Bayh's part. And as a commentator has explained, there are three reasons for reaching this conclusion: Senator Bayh's failure to refer to the numbered section amending the Equal Pay Act (Section 1009) as well; his failure to discuss Title VII in his discussion of the coverage of this "[c]entral" portion of his amendment; and his lengthy discussion of Title VII in Part B. Simpson, *Sex Discrimination in Employment under Title IX*, 48 U. Chi. L. Rev. 462, 468 n.38 (1981).

tain types of "differential treatment" of students based on sex, and to penalize violations of regulations by fund termination), the Senator defines the types of sex discrimination subject to these procedures (*ibid.*; emphasis added):

> *This portion of the amendment* covers discrimination in all areas where abuse has been mentioned—*employment practices for faculty and administrators*, scholarship aid, admissions, access to programs within the institution such as vocational education classes, and so forth. The provisions have been tested under Title VI of the 1964 Civil Rights Act for the last 8 years so that we have evidence of their effectiveness and flexibility.

Because that description of the scope of the amendment is part of a prepared statement rather than off-the-cuff remarks uttered in the heat of debate, it cannot be dismissed—in the words of the *Islesboro* court (593 F.2d at 428)—as "occasional lapses" reflecting "the imprecision of oral discussion." Rather, as the explanatory remarks of the sponsor of language ultimately enacted, this statement is an authoritative guide to the statute's construction. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951); *NLRB* v. *Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964).[19]

Remarks of the sponsor also undermine the conclusion of several courts on whose opinions the district court

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[19] The court in *Islesboro*, commenting on a very brief summary Senator Bayh asked to have printed in the record (118 Cong. Rec. 5808 (1972)), concluded (593 F.2d at 428) that the section titles "Basic Prohibition," for what became Section 901 of Title IX, and "Employment Discrimination," for the section that would amend Title VII, indicated that Section 901 was not intended to cover employment discrimination. This is not a necessary inference, and it is an incorrect one since, as we have demonstrated, and as the court of appeals below correctly concluded (Pet. App. 34A-38A), Senator Bayh's own formal description of his amendment is to the contrary. See also *Dougherty County School System* v. *Harris*, *supra*, 622 F.2d at 738.

below relied (see page 4, *supra*) that the inclusion of exemptions that make no reference to employment somehow indicates that employment practices do not come within the basic Section 901 prohibition. During the debate on Senator Bayh's amendment, and just before its passage by the Senate, Senator Pell, the floor manager of the entire education bill, addressed several questions to Senator Bayh concerning the scope of Sections 1001(a) and (b) of his amendment, the predecessors of Section 901(a) and (c) of Title IX (118 Cong. Rec. 5812-5813 (1972) (emphasis added)):

> MR. PELL. * * * Sections 1001(a) and (b) include all educational institutions which receive Federal assistance. This includes elementary and secondary schools as well. With regard to private undergraduate colleges, the Senator has excluded from coverage their admissions practices. Does the same exclusion apply to nonpublic institutions at the elementary and secondary level?
>
> MR. BAYH. At the elementary and secondary levels, admissions policies are not covered. As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of [sic] available services or studies within an institution once students are admitted, *and discrimination in employment within an institution, as a member of a faculty or whatever.*
>
> *In the area of employment, we permit no exceptions.* In the area of services, once a student is accepted within an institution, we permit no exceptions. The Senator from Rhode Island asked about admissions policies of private secondary and primary schools. They would be excepted.
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>
> MR. PELL. * * * [D]o I understand the Senator to say that the faculty of private schools would have to reflect a sexual balance?

MR. BAYH. This amendment sets no quotas. It only guarantees equality of opportunity. The Senator from Indiana cannot be sure about the sexual balance in any faculty, but as far as employment opportunities are concerned, the answer would be "Yes."

* * * * *

MR. PELL. Would this apply to a parochial school where they have nuns *as teachers?*

MR. BAYH. No. *There is an explicit exception for educational institutions controlled by a religious organization.*

* * * * *

MR. PELL. Mr. President, I refer to a preparatory school such as Peekskill Military Institute which is at the high school level. Would that school be expected to have *women teachers?*

* * * * *

MR. BAYH. *All military schools are excluded.*

As the court below reasoned (Pet. App. 39A, 41A), the "colloquy leaves little doubt that Senator Bayh intended employment practices to be covered under what is now § 901," if only because "Senator Bayh's responses to Senator Pell that the employment practices of religious and military schools were covered by the exclusions in § 901(a) would make no sense if employment practices were not included within the scope of § 901(a) to begin with."

Senator Bayh's amendment was passed by the Senate on the same day it was introduced (118 Cong. Rec. 5815 (1972)), and differences between its provisions and those of the corresponding title of the House-passed version of S. 659 were considered by the conference committee to which the bill was referred before final passage.[20]

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[20] Section 1009 of Senator Bayh's amendment, amending the Equal Pay Act, became Section 906(b)(1) of Title IX, Pub. L. No. 92-318, 86 Stat. 375. The amendment of Title VII of the Civil Rights Act of 1964 was ultimately deleted because, just before final passage of S. 659, a similar amendment was enacted as part of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, amending 42 U.S.C. 2000e(a).

3. *Conference committee action*

Among the disparities to be resolved by the conference committee was the House version's inclusion of the provision modeled after Section 604 of Title VI, excluding direct coverage of employment practices, and the Senate version's omission of such a provision. The Senate approach won the day. The Conference Report explained simply (H.R. Conf. Rep. No. 92-1085, 92d Cong., 2d Sess. 221 (1972)), that "[b]oth the Senate amendment and the House amendment provided that no person in the United States may, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" but that "[both] versions * * * contained a number of exceptions which are discussed below." In its discussion of the Section 604 language in the House bill, the report stated (*ibid.*):

> [T]he House amendment, but not the Senate amendment, provided that nothing in the title authorizes action by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. The House recedes.

Because the omission of the Section 604 language was, therefore, the result of a conscious choice, following committee consideration, it is strong evidence that Section 901 coverage of employment practices was intended. Two principal arguments have been made against this view, but each has serious shortcomings.

First, petitioners and the EEAC suggest (Pet. Br. 32-39, 52; EEAC Br. 8-11, 19) that the history of Title VI had indicated that the Section 604 language was only a clarification of the scope of Section 601 and that, in recognition of this fact, the conference committee would attach no substantive significance to dropping

the counterpart language in the House version of Title IX. But, as we show (pages 33-36, *infra*), the legislative history of Title VI indicates that Congress found it advisable to add Section 604 in order to foreclose a construction to which the broad language of Section 601 was susceptible. And, in the course of passage of the Senate version of Title IX, its sponsor attributed that very construction to it (pages 23-28, *supra*), in the absence of a counterpart to Section 604. Against that background, the deletion of a provision foreclosing that same construction cannot reasonably be treated as having no significance.

Second, petitioners and the EEAC argue (Pet. Br. 52-55; EEAC Br. 19) that the Section 604 language must have been dropped merely in order to avoid an inconsistency, *i.e.*, an exclusion of employment coverage in a title which included amendments to two statutes (Title VII and the Equal Pay Act) that concerned *only* employment. As the court below has pointed out, however (Pet. App. 43A):

> Congress could easily have drafted an employment exclusion applicable solely to the first portion of the Act. For example, Congress could readily have said: "Nothing in § 901 shall apply to any employee of any educational institution subject to this title except where a primary objective of the Federal financial assistance is to provide employment."

Moreover, it would have been equally simple for the conference committee to have noted in its report that the deletion was made "to avoid an inconsistency" with the sections of Title IX amending Title VII and the Equal Pay Act, if, in fact, this was the sole significance of the deletion. Instead, as noted, the conferees simply explained the substance of the House provision and noted that the House receded.[21]

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[21] The Court in *Cannon* v. *University of Chicago*, *supra*, while recognizing that the language of Section 601 of Title VI was

What finally emerged from the conference committee was a statute that attacked, from several directions, something Congress had perceived as a serious evil—sex discrimination in employment in the field of education. Employers who discriminated on the basis of sex were to be induced to reform their practices, or required to remedy them, through the availability of lawsuits, public and private; and when these discriminatory employment practices extended to federally assisted education programs and activities, federal funding was to be terminated in the absence of reform. Thus, the fact that discrimination on the basis of sex against those employed in education programs and activities was to be prohibited by Title VII and the Equal Pay Act is evidence, *not* that Congress intended to exclude employment coverage from Section 901, but rather that, as the court of appeals noted in this case (Pet. App. 46A-47A) and as this Court has repeatedly recognized, Congress has made available a variety of remedies, administered through various agencies, to eradicate employment discrimination. *Int'l Union of Electrical, Radio & Machine Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974). See Comment, *Eliminating Sex Discrimination in Educational Institutions: Does Title IX Reach Employment?*, 129 U. Pa. L. Rev. 417, 442-446 (1980). It was entirely consistent with that pattern for Congress simultaneously to provide several means for securing relief from sex discrimination in employment and a

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substantially identical to Section 901(a) of Title IX (441 U.S. at 694-695) and that the "genesis of Title IX also bears out its kinship with Title VI" (*id.* at 694 n.16), also acknowledged that the bill that passed the House was "modified, and then passed, by the Senate in a form that was adopted by the Conference Committee" (*id.* at 695 n.16). In *Cannon*, however, the Court had no occasion to consider the Senate "modification" of the House bill through its omission of the Section 604 language. Thus, petitioners' suggestion (Pet. Br. 30) that this Court in *Cannon* resolved *sub silentio* the question in this case is unsound.

mechanism to cut off further federal funding of programs marked by such discrimination.[22] Indeed, another part of the Title IX legislative package (Pub. L. No. 92-318, Section 906(a), 86 Stat. 375) amended a provision of Title IV of the Civil Rights Act of 1964, 42 U.S.C. (1970 ed.) 2000c-6, to permit the Attorney General, under certain circumstances, to bring suits on behalf of individuals denied admission at a public college "by reason of * * * sex"—a remedy that supplements the Title IX fund termination remedy for such individuals. Furthermore, Title VI of the Civil Rights Act of 1964, on which petitioners rest much of their argument, itself provided a remedy for race discrimination that supplemented other race discrimination remedies in Title III (Public Facilities), Title IV (Public Education), and Section 902 of Title IX (intervention by the Attorney General in private Equal Protection Clause suits), 42 U.S.C. (1964 ed.) 2000b, 2000c-6, and 2000h-2. And Section 604 itself did not reflect

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[22] Reorganization Plan No. 1 of 1978, which became law on May 5, 1978, pursuant to the operation of 5 U.S.C. 906(a), consolidated responsibility for enforcement of employment discrimination statutes, but it left the responsibility for enforcing grant-related equal employment provisions such as Title IX with the agencies administering the grant programs, subject to coordination by the Equal Employment Opportunity Commission. See the President's transmittal message to Congress, H.R. Doc. No. 95-295, 95th Cong., 2d Sess. 1, 5-6 (1978).

In Exec. Order No. 12250, issued on November 2, 1980, the President delegated to the Attorney General his authority under Section 902, 20 U.S.C. 1682, to approve Title IX regulations. 45 Fed. Reg. 72995 (1980). On April 17, 1981, the Department of Justice and the EEOC published a proposed rule for coordination of the investigation of complaints of employment discrimination that are filed with federal fund-granting agencies under, *inter alia*, Title IX, but that also come within Title VII of the Civil Rights Act of 1964 or other statutes under EEOC's jurisdiction. 46 Fed. Reg. 22395 *et seq.* (1981). The rule contemplates that fund-granting agencies such as the Department of Education will refer most complaints of *individual* acts of discrimination to the EEOC for investigation and conciliation but that the fund-granting agencies will retain any complaints of *systemic* discrimination. *Ibid.*

a congressional aversion to overlapping remedies, but served to reconcile Title VI with the nonapplicability of Title VII at that time to large segments of employment in federally assisted programs—including public employment and educational employment. See 42 U.S.C. (1964 ed.) 2000e(b) and 2000e-1.

4. The Employment Practices Limitation in Title VI

Because, as we have shown above, the Title IX bill that emerged from the conference committee generally followed the lines of the amendment sponsored by Senator Bayh, which omitted the Section 604 language and which Senator Bayh described as encompassing employment discrimination in federally assisted education programs, we do not see in the legislative history of Title VI the significance that petitioners and the EEAC ascribe to it. Because of their extensive treatment of that subject, however, we present the following brief analysis of Title VI with respect to employment coverage.

As petitioners and the EEAC correctly state (Pet. Br. 32; EEAC Br. 8), an early House version of the bill that, with various amendments, was ultimately enacted as Title VI,[23] contained substantially the same language now found in Section 601 of that title, but did not contain the employment practices limitation now found in Section 604.[24]

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[23] H.R. 7152, 88th Cong., 1st Sess. (1963). Employment discrimination generally (not limited to employers receiving federal assistance) was covered in Title VII of H.R. 7152.

[24] Section 601 of Title VI, 42 U.S.C. 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 604 of Title VI, 42 U.S.C. 2000d-3, provides:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any em-

As they note (Pet. Br. 32-36; EEAC Br. 8-9), Attorney General Robert Kennedy and some members of Congress described the proposed predecessor of Section 601 as covering only beneficiaries of federal assistance and not covering employment unless the employees were themselves direct benficiaries of the aid. The legislative record was not, however, entirely unambiguous on this point. For example, although Senator Humphrey stated that the application of Title VI in that early version to "employment in activities receiving Federal assistance" would "depend on the nature and purposes of the particular Federal assistance program" (110 Cong. Rec. 6545 (1964)), he noted in his discussion of its effect on education programs that the Commissioner of Education might "be justified in requiring elimination of racial discrimination in employment or assignment of teachers, at least where such discrimination affected the educational opportunities of students" and that Title VI would confer authority on him "to adopt, with the approval of the President, a *general* requirement that the local school authority refrain from racial discrimination in treatment of pupils and teachers, and authority to achieve compliance with that requirement by cutoff of funds or by other means authorized by law" (*ibid.*; emphasis added). Similarly, although Representative Celler, in hearings on H.R. 7152, was at times insistent on the exclusion of employment from Section 601 (see, *e.g.*, *Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules* (Pt. I), 88th Cong., 2d Sess. 141, 198, 200 (1964)), he also used, as an example, the case of a federally funded hospital guilty of discrimination "in the employment of its help by separate beds [sic]," in making the point that funds need not be terminated immediately if it would take the hospital "a period of time" to make the adjustment. *Id.* at 143.

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ployer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

In any event, some members of Congress considered the language of Section 601 far from a clear description of a limited class of beneficiaries. *Id.* at 227-228 (colloquy of Rep. Avery and Rep. McCulloch); 110 Cong. Rec. 2484 (1964) (Rep. Poff). Section 604 was thereafter added in the Senate, as part of the Mansfield-Dirksen substitute, introduced on May 26, 1964. 110 Cong. Rec. 11926 (1964). Although, as petitioners and the EEAC state (Pet. Br. 37-38; EEAC Br. 10), Senator Humphrey explained that this addition was merely a clarification rather than a substantive change (110 Cong. Rec. 12714 (1964)), another member of the Senate—Senator Holland—took a different view. He advised his colleagues that the Senate had made "substantial changes in the House-passed bill" and he proceeded to describe "65 of such changes made by the Senate." 110 Cong. Rec. 14219 (1964). Among the changes he described was the addition of Section 604 to Title VI through the Mansfield-Dirksen substitute. *Id.* at 14220. (Senator Holland also noted that the substitute made "a number of clarifying changes," but he described only the three "substantive" changes, in Sections 602, 604, and 605.) For this reason, among others, a recent commentator plausibly concluded that "[t]he employment exemption in title VI was amended onto the statute as part of a substitute written during informal bargaining between the Senate's Democratic and Republican leadership with the intention of providing a compromise that would garner enough votes to end the ongoing [Senate] filibuster." Comment, *Eliminating Sex Discrimination in Educational Institutions*, *supra*, 129 U. Pa. L. Rev. at 447 (footnote omitted).

Whether Section 604 merely clarified the meaning of Section 601 or actually represented a substantive change, however, the fact remains that Section 601, standing alone, was evidently judged an inadequate description of a class limited in the manner now proposed by petitioners. Thus any future Congress that wished to enact a

statute barring a different kind of discrimination but having essentially the same scope as Title VI could assure parallel coverage only by enacting counterparts to both Section 601 and Section 604. The Congress that enacted Section 901 of Title IX of the Education Amendments of 1972 chose not to limit coverage in the manner described in the Section 604 language, by deleting that language in conference.[25]

C. The Failure of Congress to Amend the Statute with Respect to Employment Discrimination Supports the Contemporaneous Administrative Construction, Because That Construction Has Been Called to The Attention of Congress

Acting under the authorization and direction of Section 902 of Title IX, 20 U.S.C. 1682, HEW, within

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[25] Petitioners and the EEAC (Pet. Br. 41-43; EEAC Br. 11, 26) rely on a series of cases holding that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (the operative language of which is also modelled on Section 601 of Title VI) does not prohibit discrimination based upon handicap against employees in federally assisted programs and activities. Most of those cases follow the reasoning of *Trageser* v. *Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979), which concluded that the addition to the Act in 1978 of a provision making available to persons aggrieved under Section 504, "[t]he remedies, procedures, and rights set forth in title VI" was meant to import into the Act the employment coverage limitation in Section 604 of Title VI. 590 F.2d at 88-89. But see *Simpson* v. *Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980). Whatever the validity of that construction of the Rehabilitation Act, however, the issue in this case is not affected. Title IX does not contain a provision like the 1978 addition to Section 504, and the legislative history of Title IX is different from that of the Rehabilitation Act. Thus even were employment coverage deemed excluded from the Rehabilitation Act, that conclusion would not govern the question under Title IX.

months of the passage of Title IX, began the process of formal rulemaking, which culminated in the promulgation of regulations to effectuate the Section 901 prohibition against sex discrimination. Relying upon the plain language of the statute and its legislative history, HEW included in the regulations a number of provisions prohibiting discriminatory employment practices in the education programs of federal aid recipients. *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 436-438, 465-466, 477-480 (1975) (testimony of Secretary Weinberger) (hereinafter "*Regulations Review Hearings I*").[26]

Pursuant to Section 902 of Title IX, 20 U.S.C. 1682, the regulations were submitted to the President for his

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[26] Our argument in this case is that Section 901 of Title IX covers employment practices in all education programs and activities that receive federal financial assistance and that regulations effectuating the statute, issued under Section 902, thus necessarily cover employment practices whether or not employment is a primary objective of the federal assistance. We do not contend that the regulations at issue here are valid simply because of some reasonable relationship to general objectives of the statute, liberally construed. See *Lau* v. *Nichols*, 414 U.S. 563, 571 (1974) (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring).

If the statute were to allow any discretion in the matter, the Secretary of Education would prefer to replace the present employment practices regulations with regulations covering employment only where there is a clear nexus between the alleged employment discrimination and discrimination against students (see note 7, *supra*), or where the complainant is a beneficiary of a program in which a primary objective of the federal financial assistance is to provide employment. The Department of Education has only limited expertise in employment matters. Its view is that employment cases are better resolved under Title VII of the Civil Rights Act of 1964, which provides more appropriate remedies for such cases.

approval; and after President Ford signed the regulations, they were transmitted to the Speaker of the House and the President of the Senate, pursuant to Section 431 (d) of the General Education Provisions Act, 20 U.S.C. (1970 ed., Supp. IV) 1232(d)(1).[27] Under the terms of that section, the regulations would become effective 45 days after transmittal unless Congress, by concurrent resolution, found that they were inconsistent with the authorizing statute and disapproved them.

As we explain below, the House held hearings on the regulations, but neither it nor the Senate passed a resolution of disapproval in the prescribed period, and the regulations accordingly went into effect. Approximately four months later, Congress amended 20 U.S.C. (1970 ed., Supp. IV) 1232(d)(1), to provide that failure to adopt a concurrent resolution disapproving a final regulation should not "be construed as evidence of an approval or finding of consistency necessary to establish a prima facie case, or an inference or presumption, in any judicial proceeding." Pub. L. No. 94-142, Section 7(b), 89 Stat. 796.[28] We accordingly do not rely on the failure of Congress to disapprove the regulations during that review process as evidence that it considered them valid. Nevertheless, the question whether the regulations were brought to the attention of Congress is relevant to the

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[27] This section was made applicable to Title IX regulations by Section 431(f) of the same statute, 20 U.S.C. (1970 ed., Supp. IV) 1232(f).

[28] Apparently Congress had originally contemplated making the regulation review process a test of the consistency of regulations with the statute in question. This, at any rate, was the view expressed by Representative O'Hara, Chairman of the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, in a letter to Secretary Weinberger concerning the subcommittee's proposed hearings on the Title IX regulations. *Regulations Review Hearings I* at 7. Secretary Weinberger had expressed the administration's doubt concerning the constitutional validity of this review process. *Id.* at 6-7.

determination of what weight to accord the fact that Congress later amended Section 901 of Title IX without amending it so as to foreclose the enforcement of the employment practices regulations. *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979). For that reason, and because petitioner and the EEAC have relied on remarks of Representative O'Hara, made during his subcommittee's hearings on the regulations (Pet. Br. 28-29, 53-55; EEAC Br. 14 n.23), we shall briefly describe the 1975 congressional hearings on the Title IX regulations.

Votes on resolutions to disapprove the regulations were taken by two House subcommittees; no vote was taken in the Senate. Comment, *HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 B.Y.U. L. Rev. 133, 156 (1976) (hereinafter *"Ultra Vires Challenges"*)[29] In the six-day hear-

[29] In the Senate, Senator Helms introduced a resolution disapproving the regulations in their entirety (S. Con. Res. 46, 94th Cong., 1st Sess., 121 Cong. Rec. 17300 (1975)), and Senator Laxalt introduced a resolution disapproving the regulations pertaining to athletic programs (S. Con. Res. 52, 94th Cong., 1st Sess., 121 Cong. Rec. 22940 (1975)). The Senate took no action on the resolutions, however. *Ultra Vires Challenges, supra*, 1976 B.Y.U. L. Rev. at 147 n.66.

In the House, Representative O'Hara's Subcommittee on Postsecondary Education held six days of hearings beginning June 17, 1975, and he and members of his subcommittee thereafter introduced resolutions disapproving certain portions of the regulations. 121 Cong. Rec. 21687 (1975). One of those resolutions, H.R. Con. Res. 330, which did not express disapproval of the employment practices regulations, was thereafter referred by the House Committee on Education and Labor to its Subcommittee on Equal Opportunities, which held a one-day hearing at which Representative O'Hara testified. *Hearing on House Concurrent Resolution 330 (Title IX Regulation) before the Subcomm. on Equal Opportunities of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 1, 2-21 (1975) (hereinafter *"Regulations Review Hearings II"*). (There is no record of the content of H.R. Con. Res. 329, introduced the same day as H.R. Con. Res. 330. 121 Cong. Rec. 21687 (1975); but it apparently did not concern the employment

ings before Representative O'Hara's Subcommittee on Postsecondary Education, one witness, Janet L. Kuhn, testified against the employment practices regulations, making a legislative history argument similar to that made by petitioners and the EEAC in this case. *Regulations Review Hearings I* at 401, 406-408.[30] Senator Bayh, the sponsor of the Senate version of Title IX that was substantially adopted by the conference committee (see pages 23-28, *supra*), testified that the regulations, "as the Congress mandated, call for equality in admissions * * * and in the case of teachers and other educational personnel, employment, pay, and promotions." *Id.* at 169.[31] Secretary Weinberger, in response to a question about the Department's construction of Section 901, stated that he did not see "any way you can find that employees do not participate in education programs and activities receiving Federal assistance, and, therefore, they are within the protected class * * *." *Id.* at 478. He added (*ibid.*): "If the Congress wants to exclude employment,

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practices regulations at issue in this case. See *Ultra Vires Challenges*, B.Y.U. L. Rev. at 147. In any event, Representative O'Hara did not challenge those regulations in his testimony before the Equal Opportunities Subcommittee.) The Equal Opportunities Committee voted to recommend against passage of H.R. Con. Res. 330 by the full committee. *Regulations Review Hearings II* at 39-40. No further action was taken in the House on either this resolution or on two resolutions introduced by Representative Martin (H.R. Con. Res. 310 and 311), neither of which concerned the employment practices regulations. 121 Cong. Rec. 19209 (1975); *Ultra Vires Challenges, supra*, 1976 B.Y.U. L. Rev. at 148.

[30] See also Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 Geo. L.J. 49 (1976).

[31] In his testimony on the question of defining "program or activity," Senator Bayh stressed the similarities of the statute with Title VI. *Id.* at 169-171. Since he had also, as noted above, unequivocally expressed the view that the statute reached employment discrimination, his testimony is further evidence that his references to Title VI parallels during the debates on his amendment were not indications that employment coverage was omitted.

it is the simplest thing in the world, but when you say 'no person,' there is no room for us to argue any other intent."

An HEW representative who accompanied Secretary Weinberger to the hearing testified that members of Congress and their staffs had been consulted by the Department in connection with the drafting of the regulations (*id.* at 479, testimony of Stephen Kurzman), and two other HEW representatives stated that employment practices coverage had not been a particular subject of controversy during their broad consultations on proposals for regulations (*id.* at 479-480, testimony of Peter E. Holmes and Gwen Gregory).

Notwithstanding Representative O'Hara's enthusiastic reception of Ms. Kuhn's testimony and his remarks about the genesis of the House version of Title IX (*id.* at 408-409), he did not, in his testimony on H.R. Con. Res. 330, before the Equal Opportunities Subcommittee—the body to which the resolution had been referred by the Committee on Education and Labor (see note 29, *supra*)—challenge the validity of the employment practices regulations. *Regulations Review Hearings II* at 2-21, 33-34, 38. A representative of HEW, in answer to a question from Subcommittee Chairman Hawkins, stated the Department's view that both the language and the legislative history of Title IX indicated that the statute covered employees as well as students and that the employment practices regulations were accordingly valid implementations of the statute. *Regulations Review Hearings II* at 31 (testimony of Gwen Gregory).

In spite of the fact that they did not come to a full vote in the House and Senate, it is apparent that the Title IX regulations were more pointedly brought to the attention of Congress, and, in particular, to the attention of the committees responsible for legislation in that area, than is the case with most agency regulations. While one cannot rely on the failure of Congress to pass a concurrent resolution of disapproval as evidence of its view of the validity of the regulations (see page 38,

supra), the airing of those regulations at the hearings gives special significance to the fact that in the following year, Congress amended Section 901 of Title IX by adding three new exemptions (Pub. L. No. 94-482, Section 412, 90 Stat. 2234, codified at 20 U.S.C. 1681(a)(7)-(a)(9)), but left untouched the provision at issue here, which is contained in the same section.[32]

At the same time, as the court below properly noted (Pet. App. 45A), efforts to amend Section 901 so as to limit its coverage of employment discrimination have failed. Senator Helms sponsored a bill—never passed—which would have added a provision to Title IX stating that "Nothing in [Section 901 of Title IX] shall apply to any employees of any educational institution subject to this title." S. 2146, 94th Cong., 1st Sess., 121 Cong. Rec. 23845-23847 (1975). Similarly, Senator McClure sponsored an amendment to restrict the coverage of Section 901 to the "curriculum or graduation requirements of the institutions" receiving federal assistance. 122 Cong. Rec. 28136 (1976). Senator Bayh successfully opposed it, in part on the ground that it would exempt "those areas of traditional discrimination[,]" including "employment and employment benefits[,]" that were "the reason for the congressional enactment of Title IX." *Id.* at 28144, 28147.

To be sure these post-enactment developments cannot be accorded "the weight of contemporary legislative history," but the court below would have been "remiss if [it had] ignored" such evidence. *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 687 n.7. Where "an agency's

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[32] Congress had also previously amended that section by adding an exemption pertaining to social fraternities or sororities and voluntary youth service organizations. Pub. L. No. 93-568, Section 3(a), 88 Stat. 1862. That amendment was enacted in 1974, before the period of regulation review, but after HEW had published for comment the Title IX regulations, including the employment practices regulations at issue here. 39 Fed. Reg. 22228, 22236-22238 (1974).

statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, *supra*, 442 U.S. at 554 n. 10, quoting *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 487-489 (1940). See also *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

D. The Employment Practices Regulations Are Not Inconsistent with the Program-Specific Character of the Statute

As the district court properly noted (Pet. App. 66A), Title IX is a "program-specific" statute. It is specific in two different ways: first, under the terms of Section 901, discrimination on the basis of sex is prohibited only in any "education program or activity receiving Federal financial assistance"; second, under the terms of Section 902, the effect of any termination of federal assistance (or of any refusal to grant such assistance) must be limited to the "particular program, or part thereof" in which noncompliance with implementing regulations has been found. Both of these limitations are relevant to the basic statutory goal of ensuring that federal funds do not assist any programs in which discrimination on the basis of sex occurs, while avoiding the unnecessary hardship of terminating funds to programs that in no way involve the federal government in such discrimination. See *Board of Public Instruction of Taylor County* v. *Finch*, 414 F.2d 1068, 1078 (5th Cir. 1969).[33]

[33] *Taylor County* concerned the termination of federal funds to a county public school system pursuant to Title VI of the Civil Rights Act of 1964. Although Title VI, as we have argued, differs from Title IX with regard to the coverage of employment practices, there is no basis for any difference between the two with respect either to the program-specific limitations noted above or to the definition of program for the purpose of administering the regula-

The EEAC argues (EEAC Br. 23) that any regulation of employment practices is inherently "non-program specific because employment practices cut across programs receiving federal assistance and those which do not." As we show below, however, employment practices are no less program specific than other types of educational policies that are indisputably covered by Section 901. Petitioners and the EEAC contend (Pet. Br. 85-103; EEAC Br. 21-28) that the employment practices *regulations* at issue here are invalid under Title IX because they are not program specific and, in particular, because *they* permit the Department of Education to "subject all programs of an institution, whether federally funded or not, educational or not, to [the Title IX] regulations if any one program receives federal financial assistance" (Pet. Br. 91). We submit that the employment practices regulations, read together with the general Title IX coverage regulations, may be construed more narrowly than petitioners assert and that neither the record in *North Haven* nor that in *Trumbull* presents to this Court the question whether the Department is free to construe and apply the regulations more broadly.

The court of appeals below correctly rejected the contention that employment practices are by their very nature not program specific and hence are inconsistent with both Section 901 and Section 902 of Title IX. As it explained (Pet. App. 48A-1), "[E]mployment discrimination is no less 'program specific' than other practices recognized as subject to the provisions of Title VI and Title IX." Since student admissions policies—indisputably an important target of Title IX—may, like employment practices, either apply broadly throughout an entire university or apply only in a particular graduate school or department, there is no reason to believe that regulation of employment practices is inherently inconsistent with

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tions implementing the two statutes. Petitioners appear to concede (Pet. Br. 90-93) that Title VI and Title IX are comparable in this respect.

the statute (*ibid.*). If discrimination in either admissions or employment is limited to a single department or "part" of an education program that is insulated from other parts, the fund termination sanction could be limited to funds assisting that department or program part. In sum, regulation of employment practices—in effectuation of the congressional intent we have recounted—presents no unique difficulties making it inconsistent with either Section 901 or Section 902 of Title IX.

Petitioners' contention that the regulations are impermissibly broad because they are not limited to programs receiving federal financial assistance is not ripe for consideration on the present record. While the regulations are not models of clarity on this point, they do not necessarily mandate such broad coverage. One provision, 34 C.F.R. 106.51 (the counterpart of 45 C.F.R. 86.51 (1977), considered by the district court), prohibits sex discrimination in employment "under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance." But the scope of the regulation may plausibly be limited by another section, 34 C.F.R. 106.11 (formerly 45 C.F.R. 86.11), the basic coverage provision of the Title IX regulations, which states:

> Except as provided in this subpart, this Part [106] applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.[34]

By thus indicating that the application of Title IX to a federal aid recipient is limited to that recipient's education programs or activities that receive or benefit from Federal financial assistance, the regulation implicitly pro-

[34] The exceptions set forth in that subpart (Subpart B) do not affect the employment practices regulations except to the extent that regulations implementing the religious and military schools exemptions would bar any regulation of employment practices in institutions exempted under those provisions.

vides that the mere receipt of some federal assistance by an educational institution does not necessarily subject all of its employment practices to the prohibition of Section 901 of Title IX and the implementing regulations. Thus, while the federal respondents have, in this and other related litigation, described the regulations as having a broader scope, that was not a necessary construction of the language. Any ruling on the validity of the regulations as more broadly construed, however, should be made only in a case in which it is clear that agency enforcement was not directed against education programs or activities receiving federal financial assistance.

Questions may arise in particular cases concerning how to define "education program" with respect to the practices that the Department seeks to regulate and whether particular practices are confined to programs that do not benefit from federal assistance and in no way affect programs that do.[35] In order to make this determination, the Department must be able initially to conduct a reasonably broad investigation concerning allegedly discriminatory practices, even though its investigation may finally reveal that the discrimination is limited to a program or part of a program that receives no federal funding and does not affect others that do. See Pet. App. 48A-1 to 48A-2; *United States* v. *El Camino Community College District*, 600 F.2d 1258, 1260 (9th Cir. 1979), cert. denied, 444 U.S. 1013 (1980). See also *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 (1943). Where that finding is made, Section 902 of Title IX bars any termination of funds. *Board of Public Instruction of Taylor County* v. *Finch, supra.*

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[35] Determining the scope of an "education program" is not a simple question. As commentators have suggested, the legislative histories of both Title VI and Title IX are unclear as to the definition of the term "program." See, *e.g.*, Comment, *Board of Public Instruction* v. *Finch; Unwarranted Compromise of Title VI's Termination Sanction*, 118 U. Pa. L. Rev. 1113, 1116-1124 (1970); *Ultra Vires Challenges, supra*, 1976 B.Y.U. L. Rev. at 170-172.

Such issues do not arise in the present consolidated cases, however. In *North Haven*, HEW, acting on the complaint of a North Haven teacher concerning North Haven's maternity leave and rehiring policies, sought information concerning North Haven's hiring, leave, and seniority policies respecting teachers (A. 9-11). Referral of the case for enforcement action was threatened only when North Haven refused to cooperate in the investigation (A. 14-17), and it was after that communication that North Haven filed suit contending HEW had no jurisdiction to regulate employment practices (A. 2-8). North Haven conceded in its complaint, in its responses to requests for admissions, in its answers to interrogatories, and in the "Statement of Material Facts" filed with its summary judgment motion that it received substantial federal assistance and that it used a fair proportion of that to pay employees' salaries, including the salaries of teachers (A. 6, 18-20, 21-22, 24). Since, on the basis of North Haven's own admissions, it could reasonably be concluded that North Haven's hiring, leave, and seniority policies could affect programs funded in part by federal assistance (because the payment of teacher salaries with federal assistance indicated that teachers were working in a federally assisted program or programs), the investigation was entirely proper, taking even a narrow view of "program and activity."[36] The

[36] We do not mean to suggest that a school district or institution of higher education may necessarily escape regulation of any of its employment practices by the simple expedient of allocating funds it receives to expenses other than employee salaries. If an employee works in an education program that is supported by federal assistance, the Department of Education's Title IX jurisdiction should attach without the necessity of tracing the funds to employee remuneration. Thus, the Fifth Circuit in *Dougherty County School System* v. *Harris*, 622 F.2d 735 (1980), petition for cert. pending, No. 80-1023, erred in holding that, although the language and legislative history of Title IX indicate that it "reaches at least some employment practices," the employment practices regulations were invalid in their application to discrimination

district court did not find that no North Haven teachers worked in federally assisted education programs; instead it agreed with another district court (Pet. App. 63A-64A) that Section 901 of Title IX protected only program beneficiaries and that students, not teachers, are program beneficiaries. Its judgment prevented HEW from "terminating or refusing to grant, or attempting to terminate or refuse to grant, federal financial assistance to [North Haven] for *any* alleged noncompliance with [the employment practices] regulations" (Pet. App. 71A-72A; emphasis added).

In *Trumbull*, HEW investigated the complaint of a guidance counselor, Linda Potz, and concluded from its administrative investigation that Trumbull had discriminated on the basis of sex against Potz in job assignments, working conditions, and nonrenewal of her contract (A. 33-42). In its law suit to enjoin HEW from taking any further action in the matter, Trumbull did not allege that Potz worked in an education program which received no federal assistance or that the discrimination against her affected no other federally assisted program. Indeed, in response to Potz's interrogatories concerning the amounts of federal financial assistance Trumbull received, the types of that assistance, and the programs or functions to which the assistance was allocated, Trumbull refused to answer on the grounds that the district court's decision in *North Haven*—holding that the regulations under which HEW acted were invalid because HEW had no authority to regulate employment practices—was dispositive of the case (A. 43-44). Trumbull thus took the position that the question of what education program or programs received federal financial assistance was irrele-

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against a school district's home economics teachers absent a showing that the school district had used federal funds to defray their salaries (622 F.2d at 738). This conclusion suggests that Title IX protections may be defeated by bookkeeping maneuvers, and it bears some kinship to the theory, which we have shown is erroneous, that employment must be an "objective" of federal assistance in order to trigger Title IX coverage.

vant to its basic claim; and the district court approved this position by denying Potz's motion to compel answers to her interrogatories (A. 49) and declining to set aside its order granting Trumbull's motion for summary judgment.

In sum, if we are correct in our basic submission that Section 901 prohibits employment discrimination in any education program or activity that receives federal financial assistance, even if employment is not a primary objective of the assistance, and that, accordingly, employment practice regulations applying to such programs are valid, then the court of appeals was correct in reversing the decision of the district court and vacating its judgment.[37]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

BRIAN K. LANDSBERG
MARIE E. KLIMESZ
Attorneys

SEPTEMBER 1981

[37] To the extent that the opinion of the court of appeals may suggest that HEW had the power to prohibit discrimination on the basis of sex in education programs or activities that do not receive federal financial assistance and are unaffected by those that do, those suggestions are dicta, in light of the records in these cases.

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No. 80-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE NORTH HAVEN BOARD OF EDUCATION, *Petitioner*,

v.

TERREL BELL, *et al.*, *Respondents*,

and

THE TRUMBULL BOARD OF EDUCATION, *Petitioner*,

v.

UNITED STATES DEPARTMENT OF EDUCATION AND LINDA POTZ, *Respondents*.

On A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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REPLY BRIEF FOR PETITIONERS NORTH HAVEN BOARD OF EDUCATION AND TRUMBULL BOARD OF EDUCATION

SUSAN K. KRELL
SIEGEL, O'CONNOR & KAINEN, P.C.
60 Washington Street
Hartford, CT 06106
(203) 547-0550
Counsel for Petitioner
The North Haven Board of Education

PAUL E. KNAG
CUMMINGS & LOCKWOOD
1090 Vermont Avenue, N.W.
Suite 650
Washington, D.C. 20005
(202) 842-3323
Counsel for Petitioner
The Trumbull Board of Education

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I. The Secretary of Education Has Recognized the Validity of Petitioners' Challenge

Subsequent to the filing of Petitioners' Brief, the Department of Education reexamined the regulations here in question and recognized the wisdom of the unanimous case law, other than the decision below, declaring the regulations at issue here to be invalid. This is set out in a published letter by the Secretary of Education to the Justice Department which states in part:

> I have reviewed the Department of Education's employment regulations, 34 C.F.R. Part 106, Subpart E, under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq. (1976), and have decided that they are ultra vires. I believe Title IX's

protection of beneficiaries of federally-assisted education programs was intended by Congress to parallel the protection afforded those same beneficiaries under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. Accordingly, I propose to amend the Title IX regulations concerning employment so that they parallel the Department's employment regulations under Title VI, 34 C.F.R. 100.3(c). Thus, the Title IX regulations would be amended to cover employment matters only when the complaint shows a clear nexus between the alleged employment discrimination and discrimination against the students, or when the complaint shows that the complainant is a beneficiary of a program in which a primary objective of the Federal financial assistance is to provide employment. The enclosed Notice of Proposed Rulemaking (NPRM) has been drafted to implement this proposal. This NPRM will be submitted, under separate cover, to Mr. James T. Turner, Acting Assistant Attorney General, Civil Rights Division, for your Department's approval pursuant to Executive Order 12067 (June 30, 1978) and Executive Order 12250 (November 2, 1980).

Daily Labor Report, No. 150, August 5, 1981, p. A-5.

The Secretary further noted in that letter that employment discrimination is dealt with in Title VII:

> This proposal will not diminish the Federally protected rights of persons to be free from discrimination, on the basis of sex, in employment because these rights are assured by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (1976). In fact, this NPRM was drafted to complement the proposed rule, "Employment Discrimination: Procedure for Handling Complaints," published jointly by your Department and the Equal Employment Opportunity Commission at 46 Federal Register 22395 (April 17, 1981).

Id.

In view of the foregoing, the Secretary requested that the Justice Department not defend these actions:

> I do not wish to oppose the North Haven Board of Education's proceedings before the Supreme Court in

> North Haven Board of Education v. Bell, 629 F.2d 773 (2d Cir. 1980), cert. granted, 49 U.S.L.W. 3595 (Feb. 25, 1981) (No. 80-986). I am, therefore, requesting that the Solicitor General's office attempt to reach an agreement with the petitioners and with the respondent, Linda Potz, to dismiss this case. If an agreement cannot be reached, it probably would be advisable to file the necessary papers with the Supreme Court to ensure that the Government's brief will be in harmony with our new NPRM. The enclosed NPRM should form the basis for our brief in North Haven, if one is necessary, and for our request for extension.
>
> I would also like to request that our petitions for certiorari in Seattle University v. ED., 621 F.2d 992 (9th Cir. 1980), cert. granted, 49 U.S.L.W. 3409 (Dec. 1, 1980) (No. 80-493) and Bell v. Dougherty County School System, 622 F.2d 735 (5th Cir. 1980), pet. for cert. filed, 49 U.S.L.W. 3589 (Dec. 22, 1980) (80-1023), be dismissed and withdrawn, respectively.

Id.

The Department of Justice, however, has proceeded, at least in

part[1], to attempt to defend the validity of the Subpart E regulations, despite the repudiation of these regulations by all the courts which have considered their validity except the court below, the repudiation now by the Department which administers them, and its concession that "[t]he Department of Education has only limited expertise in employment matters." (Brief for the Federal Respondents, hereinafter "Justice Department Brief", p. 37, n. 26.)

In view of this, as the Justice Department Brief recognizes (p. 37, n. 26), it can no longer be argued that the regulations should be sustained in deference to the agency's judgment.

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[1]The Justice Department stops just short of conceding the invalidity of the regulations insofar as they fail to implement the "program specific" limitations contained in Title IX. See Section III, infra.

See Southeastern Community College v. Davis, 442 U.S. 397, 412, n. 11 (1979).[2]

Indeed, because of obvious differences between the provisions of the statute and corresponding provisions of the regulations, compare e.g. § 901 with 34 C.F.R. § 106.51(a), petitioners

[2]In fact, it would appear that if the agency had expressed its current position to the Second Circuit, the result might have been different. See Davis v. United Air Lines, Inc., D.N. 81-7093, slip op. at 4872 (2d Cir. Sept. 17, 1981) where the author of the opinion below, writing for the court, indicated that in the decision below herein, the court gave weight to the "long-held, firmly established, well-reasoned position that the agency has made known to Congress and to the courts over the years. . . ." The court contrasted this with the situation in Davis, where the OFCCP had abandoned a prior position it had taken construing the Rehabilitation Act, just as the Department of Education has now done here as to the issues in this case.

contend that such regulations could not have been sustained, even under the doctrine of agency discretion, See University of Texas v. Camenisch, ____ U.S._____, 49 U.S.L.W. 4468, 4471 (1981) (Burger, C. J., concurring) [Agency lacks "authority to rewrite the statutory scheme by way of regulations".][3]

Now that the agency has proposed to revise the regulations to conform them to the statute, any deference to agency expertise should lead to the conclusion that the agency should be free to proceed with its proposed revisions to the regulations.

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[3] The language of the regulations as presently written contrasts sharply with the statutory language, in that the regulations add coverage for employment, and provide such coverage for all programs in institutions receiving or benefitting from Federal financial assistance, rather than only for education programs and activities receiving Federal financial assistance.

(footnote continued on next page)

Moreover, when seventeen out of eighteen court decisions and the agency administering a set of regulations all conclude that such regulations are invalid, it would appear prima facie that the regulations should be declared invalid in view of the principle that "if Congress intends to impose a condition on the grant of

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§ 901 provides in relevant part:

> "No person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

However, 34 C.F.R. § 106.51 (a) provides in relevant part:

> "(a) General. (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefore, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance." (Emphasis added.)

federal moneys, it must do so unambiguously." Pennhurst State School v. Halderman, ___ U.S. ___, 49 U.S.L.W. 4363, 4367 (1981).

II. The Weakness of Respondents' Arguments Is Shown By Their Undue Reliance on the Ambiguous Remarks of Sen. Bayh

The weakness of the respondents' case is also indicated by the central weight they place on ambiguous floor remarks of Sen. Bayh, claimed to show that § 901 of Title IX was directed at employment discrimination. This effort does not adequately explain the repeated, clear-cut statements by Sen. Bayh to the effect that the relevant provisions of Title IX were "parallel to those found in Title VI of the 1964

Civil Rights Act." See, e.g., 118 Cong. Rec. 5803, 5807 (1972).[4]

Under the respondents' construction, § 901 covers employment per se, in stark contrast to § 601 of Title VI. If this be the proper construction, one would have expected that in view of the statement noting the similarity between Title IX and Title VI, Sen. Bayh

[4] It also fails to adequately reflect the principles that a "reading of the legislative history must be done with an enlightened judicial eye, giving full attention to the underlying congressional purpose, the very heart of statutory analysis", see Davis v. United Air Lines, Inc., supra, D.N. 81-7093, slip op. at 4864 (2d Cir. Sept. 17, 1981), that there should be "a healthy skepticism of 'casual statements from floor debates'", Id., and that any ambiguity should have been resolved by the Second Circuit in a manner which would have avoided "decisions [which] would present different interpretations of federal law intended to be uniformly applied on a nationwide scale." National Independent Meat Packers Assoc. v. U.S.E.P.A., 566 F.2d 41, 43 (8th Cir. 1977).

would have noted that there was a key difference between Title VI and Title IX, or referred to the fact that under Title IX, HEW (in addition to the EEOC) would have general authority over employment, or argued in favor of the need for the right to cut off students' funds where there was employment discrimination. He noted none of these points.[5]

Indeed, reflecting the weakness of its argument, the Justice Department feels compelled to use two negatives in arguing that Sen. Bayh's statements "do not appear to

[5]In fact, in the sentence immediately following Sen. Bayh's six word reference to employment in part A of his prepared statement concerning the scope of his amendment, which the Justice Department has referred to in its Petition for a Writ of Certiorari in United States Department of Education v. Seattle University, No. 90-493, p. 16, as the "clearest expression of the intent of the amendment", Sen. Bayh reemphasized that these provisions "have been tested under Title VI of the 1964 Civil Rights Act." 118 Cong. Rec. 5807 (1972).

reflect a view that his amendment would not cover employment discrimination." (Justice Department Brief, p. 22.)

As has been noted, most courts which have considered the impact of Sen. Bayh's statements have concluded that Title IX included proposed amendments to Title VII and the Equal Pay Act and that references to employment can be assumed to refer to those amendments.[6]

Moreover, if the references to employment by Sen. Bayh in the context of Title IX are deemed to refer at all to § 901, they should be construed as consistent with Secretary Bell's

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[6]Sex discrimination in employment was addressed in Sen. Bayh's amendment as proposed in 1971 by the portion of the amendment that would have established a commission to recommend further legislation. At the same time, Sen. Bayh inserted into the Congressional Record a copy of a presidential task force report urging, inter alia, amendments to Title VII and the Equal Pay Act. 117 Cong. Rec. 30157-30158 (1971).

conclusion that "Title IX's protection of beneficiaries of federally-assisted education programs was intended by Congress to parallel the protection afforded those same beneficiaries under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d." Daily Labor Report, No. 150, supra, p. A-5. Such a construction would be in accordance with the concept that Title VI permits "elimination of racial discrimination in employment or assignment of teachers, at least where such discrimination affected the educational opportunities of students", as indicated by Sen. Humphrey's statements explaining § 601 prior to the addition of § 604. (Quoted in Justice Department Brief, p. 34.)[7]

[7]Senator Humphrey's statements clearly show that he considered employment as covered by § 601 only where needed

(footnote continued on next page)

Such a construction is more reasonable than the attempted repudiation by the Justice Department of the construction given to the § 601 language by its floor leaders, by the Robert Kennedy Justice Department, and by courts which construed it both before and after enactment of Title IX.[8]

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to remedy discrimination against students. The statements by the Justice Department, Congressional supporters of Title VI and subsequent case law confirm this unambiguously and without exception. (See Petitioners' Brief, pp. 31-39.)

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[8] See, e.g., United States v. Jefferson County Board of Education, 372 F.2d 836, 882-883 (5th Cir. 1966), aff'd en banc, 380 F.2d 385, cert. denied, 389 U.S. 840 (1967), noting that "Congress did not, of course, intend to provide a forum for the relief of individual teachers who might be discriminatorily discharged . . . " and quoting Sen. Humphrey's statement that § 604, excluding agency action directed at employment, "made no changes in substance in Title VI."

III. These Are Not Infection Regulations

Several of the briefs filed by respondents and *amici* seek to demonstrate from the "facts" of these cases - i.e. allegations of the complainants which have not yet been the subject of any hearing and which neither respondent has thus far had an opportunity to challenge - that claims could be framed which would show that discrimination against complainants resulted in discrimination against students. Since the instant litigation merely seeks to address the validity of Subpart E of the present regulations, the issue of whether some kind of "infection" theory might be maintained under other parts of the Title IX regulations which deal with students, or regulations yet to be promulgated, or in complainants' private suits under § 901 of Title IX which are

pending in the District of Connecticut, is not at issue.

As the court succinctly stated in Romeo Community Schools v. HEW, 438 F. Supp. 1021, 1035 (E.D. Mich. 1977), aff'd, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979), in discussing the fact that Subpart E is not an "infection" regulation:

> This deficiency is fatal to defendant's "infection" argument, for the regulations must be judged as written. This court has neither the power nor the inclination to rewrite these regulations by construing their coverage of employment practices as reaching only situations where sex discrimination against students in affected programs has resulted. Defendant's Subpart E regulations are plainly focused on employment practices per se. To judicially engraft onto each of them an implicit requirement of infection would not merely provide a saving limitation on their coverage, it would substantially alter their meaning and effect.

Hence, petitioners contend here that the regulations in question are invalid and cannot be applied to employment, predicated on discrimination against students, unless they are amended to "cover employment matters only when the complaint shows a clear nexus between the alleged employment discrimination and discrimination against the students. . . ." See Letter of Secretary Bell, Daily Labor Report, No. 150, supra, p. A-5. Moreover, in view of the express remedies under Title VII and the Equal Pay Act, such remedies should normally be deemed adequate to redress claims of employment discrimination, and thereby alleviate any resultant effects on students, consistent with the general rule in effect under Title VI that in enacting § 601, "Congress did not, of

course, intend to provide a forum for the relief of individual teachers who might be discriminatorily discharged . . . ." See United States v. Jefferson County Board of Education, supra, at 882.

IV. The Regulations Are Invalid Because They Are Not Program Specific

In contrast to its position below and the position adopted by the Second Circuit, the Justice Department has, in this Court, acknowledged the validity of certain portions of the decisions of the district court.

Specifically, the Justice Department now acknowledges that "the district court properly noted [that] Title IX is a 'program-specific' statute", that "under the terms of Section 901, discrimination on the

basis of sex is prohibited only in any 'education program or activity receiving Federal financial assistance'", and that any fund termination "must be limited to the 'particular program, or part thereof' in which noncompliance with implementing regulations has been found." (Justice Department Brief, p. 43.)

Given these admissions by the Justice Department, it would seem clear that 34 C.F.R. 106.51(a), providing that Subpart E covers "any education program or activity operated by a recipient which receives or benefits from Federal financial assistance", and extending coverage to "all employment decisions in any education program or activity operated by such recipient" (emphasis added), is invalid as contrary to the specific statutory "program specific"

limitations contained in §§ 901 and 902.[9]

However, rather than stipulate reversal as requested by the Secretary of Education, the Justice Department seems to suggest that the regulations can "plausibly" be construed as not meaning what they plainly say but rather can be read as limited to a particular program or activity. (Justice Department Brief, p. 45.)

In addition to ignoring the plain meaning of the language used in the regulations, which contrasts so obviously with the statutory language, a problem with the Justice Department's suggestion is that this new Justice

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[9]Also invalid is that statement in 34 C.F.R. § 106.11 which provides inclusively that the Title IX regulations apply "to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance" (Emphasis added.)

Department view is contrary to the all-encompassing construction of these regulations which the Justice Department admits has in fact been advocated and applied in these and other cases. (Justice Department Brief p. 46.) (See, e.g., Respondents' Appendix, p. 11 [no investigation in North Haven of program specific aspect], pp. 33-34 [finding in Trumbull does not refer to whether Potz was employed under a Federal program nor does it otherwise deal with program specific requirement of statute], p. 35 [all-encompassing § 86.51 (predecessor of 34 C.F.R. §106.51) applying Subpart E to any education program or activity operated by a recipient cited as the "applicable regulation" in Trumbull complaint].)[10]

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[10]The lengths to which the Department of Education has gone in ignoring the

(footnote continued on next page)

Hence, it should be clear that petitioners are entitled to a declaration that the regulations are invalid, in that they ignore the program specific requirement of the statute. Further, it seems clear that this Court should address and correct the erroneous statement by the Second Circuit Court of Appeals on this point rather than ignore it as dictum, as the Justice Department suggests. (See Justice Department Brief, p. 49, n. 37.) This would then allow the Secretary of Education to promulgate new regulations with reference to those subject matters which are properly covered by § 901 of

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program specific limitations of this statute is probably best illustrated by the case of amicus Hillsdale College, which refuses all federal money, but which has been subjected to regulation under Title IX.

Title IX, setting forth a proper program specific requirement, in addition to omitting broad based employment coverage.[11]

V. The Justice Department Position Lacks Merit From A Policy Standpoint

[11]Since the regulations presently contain no program specific requirement, it should not be necessary for this Court to address precisely how such requirement should be interpreted after incorporation into the regulations. However, if the Court does wish to consider the scope of the program specific requirement at this time, then petitioner would urge it to reject the Justice Department's proposed standard which would give the Department of Education the power to prohibit discrimination on the basis of sex in both education programs or activities that receive federal financial assistance and those that are "affected" by such federally assisted programs. See Justice Department Brief, p. 49, n. 37. This would trivialize the statutory program specific limitation, since it could be claimed that everything is "affected" by federal programs. Rather, the coverage should be limited as provided in § 901 to

(footnote continued on next page)

The Justice Department contends that "[u]nder [petitioners'] reading [of § 901], school districts and universities are free to discriminate, on the basis of sex, against persons employed in their federally assisted education programs and activities ..." (Justice Department Brief, p. 13.)

Since Title VII and the Equal Pay Act do proscribe such discrimination, this statement is of course totally inaccurate.

To the contrary, what has become apparent is that the excessive

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education programs or activities receiving federal funds and, pursuant to § 902, any cutoff of funds should be limited to the funding of the "particular program or part thereof" involved. Cf. Dougherty County School System v. Harris, 622 F.2d 735 (5th Cir. 1980), cert. pending, No. 80-1023; Simpson, "Sex Discrimination in Employment Under Title IX", 48 U. Chi. L. Rev. 462, 475-477 (1981). Also, of course, the regulations should not cover employment per se.

duplication of administrative jurisdiction conjured up by HEW has led to a system which "results not only in an overlap, but in a duplication of administrative and judicial proceedings." See Comment: "Title IX: Employment Discrimination in Education - North Haven Board of Education v. Hufstedler", 15 Geo. L. Rev. 451, 467 (1981).

Moreover, the apparent recognition by respondents that student fund termination is not a particularly appropriate way to deal with individual employee grievances (see Respondent Potz' Brief pp. 26-27; Justice Department Brief, p. 37, n. 26) confirms that there is little, if any, conceivable advantage to having an employee file a grievance with a Department which now admits that it has no expertise in employment matters, and which, over the

years, has consistently acknowledged its inability to process such complaints in a timely and effective manner. See 40 Fed. Reg. 24148 (1975) [wherein HEW acknowledges its inability to handle workload in this area]; Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972), 356 F. Supp. 92 (D.D.C.), aff'd in pertinent part, 480 F.2d 1159 (D.C. Cir. 1973) [court attempt to force HEW to end its inadequacy in handling discrimination cases.]

Therefore, it is respondents' reading, not petitioners', which has led to a system which risks being ineffective in redressing employment discrimination based on sex in the educational context, and which results in a proliferation of complaints which impedes rational efforts to resolve these kinds of claims in a timely manner.

In view of the foregoing, "[a] decision to exclude the area of employment discrimination from the purview of Title IX should not be construed as an expression of congressional or judicial disregard for the necessity of assuring equality of opportunity in the area of educational employment. Rather, it is a realization that the administrative and judicial methods appropriate for dealing with one situation are not necessarily adequate or desirable when addressing another." See Comment: "Title IX· Employment Discrimination in Education - North Haven Board of Education v. Hufstedler", supra at 468.

CONCLUSION

In enacting Title IX. Congress intended to protect employees from sex discrimination through Title VII and the Equal Pay Act and to protect students as under § 601 of Title VI. It

did not intend to designate HEW as a duplicate EEOC. It did not intend to permit cutoff of student funds to redress individual grievances. It did not intend to create a labyrinth of remedies which would interminably delay the resolution of employment complaints and clog the administrative process to the point where it is unable to sort out the valid complaints from the specious ones, thereby delaying or denying justice to those with valid complaints.

Seventeen out of eighteen decisions which have considered the validity of the Subpart E regulations including the decisions of Judge Ellen Bree Burns herein, have agreed that they are invalid. Now, the Secretary of Education has indicated agreement.

Accordingly, it is respectfully requested that the decision of the United States Court of Appeals for

the Second Circuit herein be vacated, and the decisions and judgments of Judge Ellen Bree Burns of the United States District Court for the District of Connecticut be reinstated.

Respectfully submitted.

NORTH HAVEN BOARD OF EDUCATION
BY SIEGEL, O'CONNOR &
KAINEN, P.C.
ITS ATTORNEYS

By_____
Susan K. Krell
60 Washington Street
Hartford, Connecticut 06106
(203) 547-0550

TRUMBULL BOARD OF EDUCATION
BY CUMMINGS & LOCKWOOD
ITS ATTORNEYS

By_____
Paul E. Knag
1090 Vermont Avenue, N.W.
Washington, D. C. 20005
(202) 842-3336

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IN THE

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OCTOBER TERM, 1981

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Petitioners,

v.

TERREL H. BELL, SECRETARY,
DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

On Writ of Certiorari from the Court of Appeals for the Second Circuit

---

BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENTS OF AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AMERICAN CIVIL LIBERTIES UNION WOMEN'S RIGHTS PROJECT, CENTER FOR NATIONAL POLICY REVIEW, COALITION OF 100 BLACK WOMEN, DELTA SIGMA THETA SORORITY, INC., DISPLACED HOMEMAKERS NETWORK, INC., EMPLOYMENT LAW CENTER OF THE LEGAL AID SOCIETY OF SAN FRANCISCO, FEDERATION OF ORGANIZATIONS FOR PROFESSIONAL WOMEN, LEAGUE OF WOMEN VOT-

[Additional Amici Curiae listed on inside cover]

MARGARET A. KOHN
MARCIA D. GREENBERGER
National Women's
Law Center
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670

Attorneys for *Amici Curiae*

September 8, 1981

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DEFENSE AND EDUCATION FUND, ORGANIZATION OF CHINESE AMERICAN WOMEN, RURAL AMERICAN WOMEN, SOUTHERN COALITION FOR EDUCATIONAL EQUITY, WOMEN EMPLOYED, WOMEN'S EQUITY ACTION LEAGUE, WOMEN'S LEGAL DEFENSE FUND, WIDER OPPORTUNITIES FOR WOMEN, AND UNITED STATES STUDENT ASSOCIATION

INTEREST OF *AMICI*

This brief is filed on behalf of the American Association of University Women, American Civil Liberties Union Women's Rights Project, Center for National Policy Review, Coalition of 100 Black Women, Delta Sigma Theta Sorority, Inc., Displaced Homemakers Network, Inc., Employment Law Center of the Legal Aid Society of San Francisco, Federation of Organizations for Professional Women, League of Women Voters of the United States, National Association of Black Women Attorneys, National Association of Commissions for Women, National Bar Association, National Conference of Black Lawyers Washington, D.C. Chapter, National Conference of Puerto Rican Women, National Council of Negro Women, Inc., National Education Association, National Legal Aid and Defender Association, National Women's Leadership Network, National Women's Political Caucus, NOW Legal Defense and Education Fund, Organization of Chinese American Women, Rural American Women, Southern Coalition for Educational Equity, Women Employed, Women's Equity Action League, Women's Legal Defense Fund, Wider Opportunities for Women, and United States Student Association.

These organizations share a concern that individuals be free to participate in all facets of American life without discrimination on the basis of gender. Central to the effort to secure equal rights for women is the establishment of an educational system which is itself free from gender-based bias. Title IX of the Education Amend-

ments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX") is one of the most important tools available to combat sex discrimination in educational institutions. To exclude employment discrimination from its scope would be to eliminate a critical means for securing sex equity in schools, adversely affecting both employees and students alike.

Because of these organizations' long-standing work towards the elimination of gender discrimination, they believe their brief will be of substantial assistance to the Court in the resolution of the issues raised by this case. In particular, their brief will not restate the analysis of the statute, legislative history and case law to be presented by the respondents, but rather will focus upon the special concerns of Congress in addressing gender-based employment discrimination in schools in 1972 in contrast to its perception of the problem in earlier years, the importance of Title IX coverage of employment discrimination, and the broad array of federal funds which benefit employees of educational institutions.

SUMMARY OF ARGUMENT

The instant case presents the issue of whether Title IX prohibits sex discrimination in the employment policies and practices of educational institutions receiving federal financial assistance. The United States Court of Appeals for the Second Circuit below held that employment discrimination *per se* by recipients of federal aid is prohibited by Title IX. *North Haven Board of Education* v. *Hufstedler*, 629 F.2d 773 (2d Cir. 1980), *cert. granted*, 101 S.Ct. 1345 (1981). The Fifth Circuit has also held that the employment relationship is covered whenever the recipient's employees are paid with federal funds. *Dougherty County School System* v. *Harris*, 622 F.2d 735 (5th Cir. 1980), *petition for cert. filed sub nom., Bell* v. *Dougherty County School System*, 49

U.S.L.W. 3495 (Dec. 12, 1980) (No. 80-1023). However, several other circuit courts have reached the opposite conclusion. *Seattle University* v. *United States Department of Health, Education and Welfare*, 621 F.2d 992 (9th Cir.), *cert. granted*, 101 S.Ct. 563 (1980) (No. 80-493); *Romeo Community Schools* v. *HEW*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); *Islesboro School Committee* v. *Califano*, 593 F.2d 424 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979) and *Junior College District of St. Louis* v. *Califano*, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979).[1]

In this brief, *amici* will not restate the analysis of the statute, legislative history and case law presented by the respondent Terrel H. Bell, Secretary of Education. Rather, *amici* will focus upon the particular concern Congress had with regard to gender-based employment discrimination by schools when enacting Title IX as contrasted to the approach to employment discrimination taken by the Congress in 1964 when it enacted Title VI.[2] Its better understanding of the problems of employment discrimination in general, as well as the particularly serious adverse consequences of sex discrimination in employment by schools, led the Congress in 1972 to adopt a broader approach to remedy the problems of employment discrimination than it had taken in 1964. Hence, as *amici* discuss below, even though Congress expressly modeled Title IX after Title VI, it intended to enact a broader Title IX prohibition against employment discrimination in schools, and purposely omitted the Title VI

[1] These Courts did not find, however, that employment discrimination could not be reached to the extent that a showing of adverse impact on students is shown, or to the extent that the employment discrimination takes place in a program receiving federal funds whose primary purpose is to support employment.

[2] Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d *et seq.* (1970) ("Title VI").

employment exclusion in order to secure that additional protection.

Moreover, by including coverage of employment practices and policies in Title IX, Congress added an important remedy to combat problems of sex discrimination in schools—a remedy which included the enforcement capabilities of the Office for Civil Rights, then in the Department of Health, Education and Welfare [3] as well as the remedy of federal fund termination which is not available under Title VII. Given the broad-based federal financial assistance benefiting both students and employees, this additional Title IX remedy is particularly appropriate and important.

ARGUMENT

I. IN 1972 CONGRESS EXPANDED THE PROHIBITIONS AGAINST SEX DISCRIMINATION IN EMPLOYMENT BY EDUCATIONAL INSTITUTIONS

With the Civil Rights Act of 1964,[4] Congress passed sweeping legislation addressing the problems of discrimination in this country. Included in the legislation was Title VI, prohibiting discrimination on the basis of race or national origin in programs or activities receiving federal financial assistance, and Title VII,[5] prohibiting employment discrimination on the basis of race, sex, national origin or religion.

As beginning efforts, these laws had limitations in their scope and coverage. Title VII, for example, did not apply

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[3] Chief responsibility for Title IX enforcement is now lodged in the Department of Education. Moreover, other federal agencies which provide educational funding have Title IX enforcement responsibilities including the Department of Defense and the Department of Agriculture.

[4] Pub. L. No. 88-352, 42 U.S.C. §§ 2000a-2000g (1970).

[5] 78 Stat. 253, 42 U.S.C. § 2000e *et seq.* (1970).

to educational activities of educational institutions or to public employees.[6] As a result, teachers and school administrators at all levels were denied Title VII protection against employment discrimination on the basis of race, sex, national origin or religion. Consistent with this limitation, Congress excluded most employment discrimination from coverage under Title VI.[7] These legislative exemptions reflected a cautious approach as Congress entered a new sphere of regulation.

By 1972, Congress had gained substantial experience and additional information concerning the nature of employment discrimination in general and in schools in particular. Moreover, it had the opportunity to review the operation of Title VI and Title VII, and to reach conclusions about their limitations as originally drafted.

As a result of this review, Congress addressed the problems of sex discrimination in educational institutions in a sweeping manner, both as it affected students and employees. Congress amended Title VII to remove the exclusion of coverage for educational activities of educational institutions;[8] amended the Equal Pay Act of 1963[9] to remove the exemption of professional employees including teachers;[10] and passed Title IX which on its

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[6] 42 U.S.C. § 2000e-1 (1970).

[7] 42 U.S.C. § 2000d-3 (1970).

[8] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, 42 U.S.C. § 2000e-1 (1970) (Supp. V 1975). In this Act, Congress also removed an exemption for public employers affecting public schools as employers among others. Pub. L. No. 92-261, § 2(1), 86 Stat. 103, 42 U.S.C. § 2000e(a) (1970) (Supp. V 1975).

[9] 29 U.S.C. § 206(d) (1970).

[10] Education Amendments of 1972, Pub. L. No. 92-318, Title IX, § 906(b)(1), 86 Stat. 375, amending § 13(a) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a), so that the Equal Pay Act would apply to teachers and administrative personnel in schools.

face broadly prohibits sex discrimination of any type [11] in educational institutions receiving federal funds.

The concern with employment discrimination in schools was a theme repeatedly expressed by the Congress. As Senator Williams [12] stated during the Congressional debate on the Equal Employment Opportunity Act of 1972:

> "The existence of discrimination in the employment practices of our Nation's educational institutions is well known, and has been adequately demonstrated by overwhelming statistical evidence as well as numerous complaints from groups and individuals. Minorities and women continue to be subject to blatant discrimination in these institutions.
>
> As regards minorities, statistical studies show that minorities are generally underrepresented in teaching positions in educational institutions, and those that are employed are relegated to the lower paying and less prestigious positions. . . .
>
> *Perhaps the most extensive discrimination in educational institutions, however, is found in the treatment of women.* While women are generally well represented statistically in terms of numbers employed, they are generally relegated to the lowest paying and least prestigious jobs. Women account for the majority of teachers in elementary and secondary schools but they are virtually totally excluded from positions as principals and other administrative or decisionmaking positions.
>
> In institutions of higher education women are almost totally absent in the position of academic dean, and are grossly underrepresented in all other major faculty positions. Also, I would add, that the

[11] The statute contains limited exceptions, but none exempt employment from coverage in contrast to the employment exemption in Title VI.

[12] Senator Williams sponsored the amendment and was floor manager of the debate.

> discrimination does not only exist as regards to the acquiring of jobs, but that it is similarly prevalent in the area of salaries and promotions where studies have shown a well-established pattern of unlawful wage differentials and discriminatory promotion policies." (emphasis supplied).

118 CONG. REC. 1992 (1972) (Remarks of Sen. Williams).

Similarly, the Report of the House Committee on Education and Labor, in explaining its version of the Title VII Amendments, stated:

> "The committee feels that discrimination in educational institutions is especially critical. The committee cannot imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development. *To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination.*" (emphasis supplied).

H.R. REP. NO. 353, 92d Cong., 1st Sess. 20 (1971). The Senate Report made similar conclusions. S. REP. NO. 92-415, 92d Cong., 1st Sess. 11-12 (1971).

Congress' greater understanding of the problems of employment discrimination as it exists in educational institutions had as a basis the testimony presented in hearings preceding the enactment of Title IX and the Equal Employment Opportunity Act of 1972. The underrepresentation of women in American college and university faculties was well-documented in the hearings. Women were least often found in the sciences and engineering faculties and, when they were present in the faculty, women were clustered in the lower ranks and in positions outside the promotional ladders leading to academic tenure.[13] Women rarely held the administrative positions of

[13] *See, e.g., Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (Part 1) 301 (1970) (Prepared State-

academic dean, provost, president, chancellor or the lesser positions leading to these posts.[14]

Further, the particular and special importance of employment discriminaiton in schools was underscored. When Title IX was under consideration by the Congress in 1971, Dr. Pauli Murray reported that:

> "A more far-reaching result for which colleges and universities are directly responsible is the continued lack of 'role models' to encourage younger women to raise their goals and expectations and the perpetuation of the stereo-type that women are not a good academic investment. As the report on women at Columbia University pointed out:
>
> > We are puzzled by the Graduate Faculties' commitment to train women, but not to hire them. We know from experience as students and teachers that it is vital for women students in graduate school to see women engaged in the academic profession as naturally as men are . . . . By the obvious scarcity of women training graduate students, the institution acclimatizes women students to their professional expectations: low rank, low pay, low status, a slower rate of promotion than their male colleagues, and a more difficult tenure hurdle.

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ment of Dr. Bernice Sandler) [hereinafter cited as 1970 House Hearings (Part 1)], and *id.* at 338 (Prepared Statement of Dr. Pauli Murray), and *id.* at 453 (Testimony of Virginia R. Allen) and *id.* at 591 (Prepared Statement of Women's Rights Committee of New York University School of Law); Loeb, Report on the University of Illinois Urbana-Champaign, Ill. in *Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (Part 2) 1225 (1970) [hereinafter cited as 1970 House Hearings (Part 2)].

[14] *See, e.g.*, Sandler, Sex Discrimination at the University of Maryland, in 1970 House Hearings (Part 2), *supra* note 13, at 1024-1029; 1970 House Hearings (Part 1), *supra* note 13, at 301 (Prepared Statement of Dr. Bernice Sandler).

> Similarly, the report on women at Harvard University noted that the scarcity of women scholars in the senior ranks at Harvard tends to discourage the professional aspirations of women students and junior faculty. Thus, the self-fulfilling prophecy continues to operate. 'Since women have a visibly lower chance of success than men,' said Dr. Scott, 'fewer women are inspired to try, lowering in turn the numbers of women available' for academic positions." [footnotes omitted]

Murray, P., *Economic and Educational Inequality Based on Sex; An Overview*, 5 VAL. U. L. REV. 237 (1971) at 269-70. At the 1970 Congressional Hearings on Discrimination Against Women, the serious and varied negative ramifications for female students of discrimination against faculty women were highlighted in the submissions and statements of several individuals who were university faculty or administrators or social scientists.[15]

Later studies have served to reinforce these earlier findings, and the conclusions Congress reached in 1972. It is well accepted that the availability of and access to role models has an influence on career choice by individuals. C. Safilios-Rothschild, *Sex Role Socialization and Sex Discrimination: A Synthesis and Critique of the Literature*, N.I.E., U.S. Department of HEW, Washington, D.C. (1979) at 79-80. Several national and state bodies have recognized the need for female role models for women students. *See, e.g.*, Carnegie Commission on

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[15] *See, e.g.*, Scott, *The Half-Eaten Apple: A Look at Sex Discrimination in the Univ.*, REPORTER, May 14, 1970, *reprinted in* 1970 House Hearings (Part 1) *supra*, note 13, at 147; 1970 House Hearings (Part 2) *supra*, note 13, at 1081 (letter to Chairman Green, dated July 12, 1970, with encl. from Sheila Tobias); *id.* at 1091-1093 (Prepared Statement of Helen B. Schleman); Rossi, Alice, *Status of Women in Graduate Departments of Sociology 1968-69*, 5 THE AM. SOCIOLOGIST (Feb. 1970), *reprinted in* 1970 House Hearings (Part 2) *supra*, 1242 at 1251-52.

Higher Education, *Opportunities for Women in Higher Education*, McGraw-Hill, Hightstown, N.J. (1973) at 68; National Advisory Council on Women's Educational Programs, *Equity for the Eighties: Fifth Annual Report*, U.S. Government Printing Office (1980) at 18 and *Toward Educational Equity: A Report of Findings From Outreach Activities During 1976*, U.S. Government Printing Office (1976) at 4; Council on the Economic Status of Women, *Minnesota Women in Education*, St. Paul, Minn. (1979) at 15; Pennsylvania Commission for Women, *Vocational Education and Apprenticeship Training of Women in Pennsylvania* (1978) at ii.

In 1973, the Carnegie Commission on Higher Education noted that undergraduate women could be discouraged from enrolling in traditionally male fields because the absence of women faculty there conveyed the impression that women could not succeed in the field. It also recognized the low level of support offered by male faculty in prestigious research-oriented institutions to females seeking training in their fields. *Opportunities for Women in Higher Education, supra* at 68. The Carnegie Commission endorsed changes in faculty employment practices that are premised on the special connection between employment practices and the level of educational opportunity offered to women students. *Id.* at 4.

In her study of women career achievers, Dr. M. Elizabeth Tidball found a high, statistically significant dependence between the presence of career-successful women on the faculty of colleges and universities and the rate with which those institutions produced women with high career achievement. Tidball, M.E., *Women's Colleges and Women Achievers Revisited*, 5 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 504 (1980) at 508. *See also* Tidball, M.E., *Of Men and Research*, 47 JOURNAL OF HIGHER EDUCATION 373 (1976) at 386-387; and Tidball, M.E., *The Search for Talented Women*, 6 CHANGE 51-52, 64 (1974).

At the secondary and postsecondary levels, the dynamics of role models are much the same for women in vocational education programs as they are for those in an academic degree program. The majority of women students have historically been enrolled in only three of the major areas of vocational training offered by schools: office work, health services and home economics. The better-paying areas—technical, trade, and industrial courses and agriculture—are dominated by male instructors and male students. *Hearings on Sex Discrimination and Sex Stereotyping in Vocational Education Before the Subcomm. on Elementary, Secondary and Vocational Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975) 2-13 (testimony of Dr. Marilyn Steele) and *id.* at 102-114 (prepared statement of Pamela Ann Roby). The importance of moving women into teaching positions in these fields and into vocational education administration has been noted at Congressional hearings, *id.* at 109, and in the recommendations of several commissions and councils. *See, e.g., Minnesota Women & Education, supra* at 11-16, 25-26. One of the major recommendations of the Pennsylvania Commission for Women's Task Force on Vocational Education and Apprenticeship Training was for an increase in the number of women in decision-making positions in vocational education, both to provide leadership vital to reducing sex-stereotyped programs and to serve as role models for the women and girls training in the area. *Vocational Education and Apprenticeship Training of Women in Pennsylvania, supra* at ii.[16]

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[16] Of course, where the connection is shown between employment discrimination and discrimination against students, such discrimination can be addressed as discrimination against students even under Title VI which contains language exempting employment discrimination from coverage unless the federal aid program was intended primarily to create jobs. 42 U.S.C. § 2000d-3. *See, e.g.*, United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied sub*

In sum, the same Congress which enacted Title IX also declared its increased awareness of the problems of discrimination in employment, and the particularly serious problem of sex discrimination in employment by educational institutions. As the Senate Report on the Equal Employment Opportunity Act of 1972 explained, "it has been demonstrated that employment discrimination is even more pervasive and tenacious than Congress had assumed it to be at the time it passed the Act [Title VII]." S. REP. No. 92-415, 92d Cong., 1st Sess. 4 (1971). It is against this backdrop that the passage of Title IX, and the elimination of the Title VI exclusion of employment discrimination, must be read.

II. THE FAILURE OF CONGRESS TO INCLUDE IN TITLE IX THE TITLE VI EXEMPTION OF EMPLOYMENT DISCRIMINATION REFLECTS ITS INTENTION TO PROHIBIT EMPLOYMENT DISCRIMINATION *PER SE* NOT ONLY IN TITLE VII BUT ALSO IN TITLE IX

The Courts holding that employment discrimination *per se* is not covered under Title IX [17] have viewed the amendment of Title VII to include educational institutions as the exclusive remedy available to address problems of sex discrimination in employment by schools. These cases hold that even though Title VII was amended to include educational institutions, and even though Congress thereafter enacted Title IX without an employ-

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nom. Caddo Parish School Bd. v. United States, 389 U.S. 840 (1967); Caulfield v. Bd. of Educ. of City of New York, 486 F.Supp. 862, 882 (E.D.N.Y. 1979), *aff'd*, 632 F.2d 999, 1005 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 1739 (1981); United States v. El Camino Community College District, 600 F.2d 1258 (9th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

[17] *See* Romeo Community Schools v. U.S. Dept. of HEW, *supra*; Islesboro School Comm. v. Califano, supra, Junior College Dist. of St. Louis v. Califano, *supra*; Seattle University v. U.S. Dept. of HEW, *supra*.

ment discrimination exemption, a Title VI-like employment exemption must be read into the statute.

However, for Congress to prohibit employment discrimination in schools, as it did when it amended Title VII, yet retain an employment exemption when it then enacted Title IX, is contrary to Congress' consistent approach in dealing with problems of employment discrimination. Congress has repeatedly responded to the range and complexity of employment discrimination by enacting independent statutes vesting the courts and governmental agencies with overlapping power to enforce their legislative objectives. Rather than limiting coverage, Congress has consistently expanded employment discrimination prohibitions through numerous avenues.

It has been well established by the courts that Title VII is not the exclusive remedy for unlawful employment practices, and that there are varied sources of relief available. The Supreme Court has expressly recognized Congress' approach of overlapping remedies in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47-49 (1974):

> [L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination . . . . [T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

See also Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *International Union of Electrical, Radio & Machine Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 996 (D.C. Cir. 1973); *Alpha Portland Cement Co.* v. *Reese*, 507 F.2d 607, 610 (5th Cir.

1975); *Piva* v. *Xerox*, 376 F.Supp. 242, 246 (N.D. Cal. 1974).

Further, the enactment of overlapping remedies is not unique to the area of employment discrimination. Congress has frequently permitted simultaneous use of different proceedings for relief. For example, in the antitrust area the Federal Trade Commission Act (FTCA) [18] was designed by Congress to supplement and bolster the Sherman Act [19] and the Clayton Act.[20]

In *F.T.C.* v. *Cement Institute*, 333 U.S. 683 (1948), the Supreme Court explained that the Sherman Act and the FTCA were designed to provide the government with cumulative remedies against activities detrimental to fair competition. Congress proposed to enforce the Sherman Act through the Justice Department and to supplement that enforcement through the administrative process of the FTC. The FTC was not envisioned as a rival, but as an aid to the Sherman Act. *F.T.C.* v. *Cement Institute*, *supra*, at 694-95. *See also*, *F.T.C.* v. *Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 394 (1953).

Similarly, the Federal Trade Commission and the Food and Drug Administration share overlapping jurisdiction in the prevention of deceptive drug labeling. The FTCA has provisions for the FTC to prevent unfair and deceptive labeling practices. The Food, Drug and Cosmetic Act [21] enables the Food and Drug Administration to review drug labeling and ensure the accuracy of the information. In *Warner Lambert Co.* v. *FTC*, 361 F. Supp. 948, 952-953 (D.D.C. 1973), the court held that concur-

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[18] 15 U.S.C. § 41 *et seq.* (1970).

[19] 15 U.S.C. §§ 1-7 (1970).

[20] 15 U.S.C. § 12 *et seq.* (1970).

[21] 21 U.S.C. § 301 *et seq.* (1970).

rent proceedings by both agencies were proper and that the statutory remedies of the two are cumulative and not mutually exclusive.[22]

Moreover, given the particular focus of and remedies under Title IX, its coverage of employment discrimination is particularly important. The court in *Islesboro Sch. Comm.* v. *Califano*, *supra*, at 430, upon which both the Sixth Circuit in *Romeo* and the Eighth Circuit in *Junior College* rely, erroneously assumed that the issue of Title IX coverage was a question of "largely academic interest" because Title VII was amended to prohibit the particular employment practices complained of in that case. This assumption highlights the First Circuit's misperception of the importance of Title IX employment coverage, and may explain why the court did not understand Congress' intention to include employment within the scope of Title IX. Similarly, the *Romeo* court views the Title VII remedies as "superior" to those of Title IX. *Romeo Community Schools* v. *U.S. Department of HEW*, *supra* at 584.

In fact, however, unlike the Equal Pay Act and Title VII, Title IX is directed toward the federal government's responsibility to assure that federal funds are not used to aid or abet unlawful sex discrimination. With employment discrimination covered under Title IX, employees receive the extra protection which accompanies a sanction not available under Title VII or the Equal Pay Act—that of federal fund termination if the employment discrimination is not stopped. Clearly the prospect of losing federal funding can provide at least as great an incentive to a school to eliminate its discriminatory employment

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[22] *See also*, section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1) (1976) (Supp. III 1979) and Section 8 of the National Labor Relations Act, 29 U.S.C. § 158 (1970), which provide overlapping remedies for the protection of miners' safety and health activities.

policies and practices as the chance that an employee might seek individual remedies through a Title VII or Equal Pay Act case. *See North Haven Board of Education* v. *Hufstedler*, *supra* at 784-785.

Further, the coverage of employment discrimination under Title IX brings with it the benefits of a governmental enforcement scheme which runs parallel to those designed to enforce Title VII and the Equal Pay Act. The Office for Civil Rights, which has special expertise with respect to schools, is available to respond to discrimination complaints, and to conduct its own investigations of compliance. Moreover, given the special interrelationship between employment and student discrimination in schools, it is particularly beneficial for the Office for Civil Rights to have the authority to review both together, or aspects of each as it determines is necessary or appropriate.

The special importance of assuring that federal funds are not used in a discriminatory manner is the basis as well for Executive Order 11246,[23] which prohibits employment discrimination by any employers receiving federal contracts. The program for enforcement of this Order, delegated to the U.S. Department of Labor and funded by Congress, uses fund termination as its basic remedy when conciliation fails. 41 C.F.R. § 60-1 *et seq.* The Executive Order enforcement purpose is similar to the Department of Education's Title IX enforcement goal—to assure that federal funds are used in a nondiscriminatory manner. Just as the Executive Order prohibitions against employment discrimination are neither of only academic interest, nor inferior in importance to those of Title VII and the Equal Pay Act, so too the employment discrimination prohibitions of Title IX are of great significance.

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[23] 30 Fed. Reg. 12319 (1965) *as amended by* Exec. Order No. 11375, 32 Fed. Reg. 14303 (1967), *reprinted in* 42 U.S.C. § 2000e (1970).

Moreover, as Congress was aware in 1972, the Executive Order applies only to federal contracts, unlike Title IX which also applies to grants and loans. 34 C.F.R. § 106.2(g). Therefore, as a practical matter, the Executive Order has virtually no application to elementary and secondary schools which receive vast grants, but not contracts, from the federal government. Title IX's coverage of employment extends to elementary and secondary schools the fund-termination remedy and a federal enforcement scheme which applies to virtually all other major employers through the Executive Order program.[24] As the Supreme Court stated in *Cannon* v. *University of Chicago*, 444 U.S. 677, 99 S.Ct. 1946, 1965 (1979), when addressing the issue of whether Title IX includes a private right of action:

> The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section.

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[24] Moreover, the court enforcement powers of the Equal Employment Opportunity Commission ("EEOC") do not extend to public employees. 42 U.S.C. § 2000e-5(f)(1970)(Supp. III 1973). Thus, for the public school teacher or principal and the faculty and administration in public, postsecondary institutions, if conciliation of a complaint fails, unless the case is referred by EEOC to the Justice Department and pursued by that agency, these employees will have to pursue their rights as private plaintiffs, often a tremendously costly undertaking. The resources of the Justice Department's Civil Rights Division unit for fair employment litigation are far less extensive than those available to EEOC for this purpose, which places most teachers at a clear disadvantage in comparison to employees in the private sector. Private sector employees have, for the most part, both the Title VII options with the potential of EEOC undertaking litigation and the remedies offered by the Department of Labor's Executive Order 11246 enforcement program. *See* discussion, *supra* at 17-18. Title IX employment coverage helps to fill this gap for public sector educators.

III. FEDERAL FINANCIAL ASSISTANCE FLOWS BOTH TO STUDENTS AND EMPLOYEES

A further argument advanced as to why Title IX does not prohibit employment discrimination is that Congress could not have intended the severe sanction of fund termination to apply where employment discrimination was shown. *Romeo Community Schools* v. *HEW*, *supra* at 584. The cases also hold that employees are not beneficiaries of federal financial assistance to educational institutions. *Romeo Community Schools* v. *HEW*, *supra*, at 584; *Islesboro Sch. Comm.* v. *Califano*, *supra*, at 426. This reasoning not only ignores the seriousness with which the 1972 Congress viewed employment discrimination in schools, *see North Haven Board of Education* v. *Hufstedler*, *supra*, at 785, but also ignores the nature of much of the federal financial assistance flowing to schools, which directly benefits employees as well as students.

There is no question that teachers as well as students are the intended beneficiaries of federal funding programs in schools. For example, there is express statutory language which identifies teachers as the intended beneficiaries of federal funds. *See, e.g.*, Education Amendments of 1972, Pub. L. No. 92-318, Title VII, 20 U.S.C. § 1601 *et seq.* (1970) (Supp. V 1975). Indeed, the stated purpose of this legislation, enacted at the same time Title IX became law, is:

> "(1) to meet the special needs incident to the elimination of minority group segregation and discrimination among students *and faculty in elementary and secondary schools;* . . . ." (emphasis supplied)

20 U.S.C. § 1601(b)(2) (1970) (Supp. V 1975). Activities authorized by this statute include training and retraining of staff and the recruiting, hiring and training of teacher aides. 20 U.S.C. §§ 1606(a)(2), (3) and (4)

(1970) (Supp. V 1975).[25] Therefore, at the very time Congress enacted Title IX, it also enacted educational funding statutes with the express purpose of aiding faculty as well as students.

However, the federal funding benefiting employees in schools is far more extensive than special purpose funding statutes such as the one discussed above. The Fifth Circuit in *Dougherty County School System* v. *Harris*, *supra* at 738, recognizes that in fact teacher salaries may be paid by a federally funded program, regardless of whether teachers are expressly termed beneficiaries, and that in such cases employment discrimination on the basis of sex is prohibited under Title IX.

Moreover, schools also receive vast amounts of virtually unrestricted federal funds which benefit both employees and students, and flow through the educational institution. *North Haven Board of Education* v. *Hufstedler*, *supra* at 785-786. For example, Congress provides funds on a formula basis for elementary and secondary school districts which serve children residing on federal property, children whose parents work on federal property or are on active duty in the uniformed services, and children whose parents are refugees. The statute also offers assistance to local educational agencies in those communities where the tax base has been reduced by substantial acquisition of real property. 20 U.S.C. §§ 237-

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[25] In 1978, these provisions were repealed effective September 30, 1979. Pub. L. No. 95-561, Title VI, § 617(b)(2), 92 Stat. 2268, but the relevant section of the purpose clause relied upon by *amici*, 20 U.S.C. § 1601(b)(2) (1970) (Supp. V 1975), was reenacted in Pub. L. No. 95-561, Title VI, § 602(b)(2)(1978), and is now codified at 20 U.S.C. § 3192(b)(1)(1976)(Supp. III 1979). Authorized activities continue to include programs specifically for the teaching staff. *See* 20 U.S.C. § 3197 (1976) (Supp. III 1979), which replaced § 707 of the 1972 enactment of the Emergency School Aid Act, Pub. L. No. 92-318, Title VII, § 707, 20 U.S.C. § 1606 (1970)(Supp. V 1975).

238 (1970). This program, commonly known as Impact Aid, and solidly in place before Title IX was passed, assisted 4,800 school districts in FY 1972.[26] No restrictions are placed on these funds once they are received by the local educational agency.

The Impact Aid program also provides construction assistance support for minimum school facilities where substantial increases in school membership have been caused by federal activities or where reconstruction of facilities is necessitated by a national disaster. 20 U.S.C. § 241-1 (1970). In 1972, over $25,000,000 was obligated under this program.[27]

At the postsecondary level, the federal government has provided increasing resources for undergraduate and graduate student support. Several of these programs provide grants and/or loans to students needing funds to pay tuition and fees or for basic support during the absence from the work force occasioned by their studies. In 1970-1972, the period during which Title IX was under consideration by the Congress, there were several active higher education grant mechanisms. The oldest was the Veterans' Educational Assistance program, 38 U.S.C. § 1651 *et seq.* (1970) administered by the Veterans' Administration, which provides funds to individuals who have completed military service or had their education interrupted by active duty.[28] Over $1.5 billion was obli-

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[26] During FY 1972, grants of $592,580,000 were obligated. *Catalogue of Federal Education Assistance Programs*, Office of Education, U.S. Department of HEW, U.S. Government Printing Office, 1974 at 149.

[27] *Catalogue of Federal Education Assistance Programs, supra*, note 26, at 148.

[28] The Veterans' Administration has also issued proposed Title IX regulations, 44 Fed. Reg. 24320 (April 25, 1979) as required by statute. Executive Order 12250 assigns responsibility for coordinating enforcement of Title IX *inter alia*, to the Attorney General. 45 Fed. Reg. 72995 (Nov. 4, 1980).

gated in FY 1971 under this program. *Catalogue of Federal Education Assistance Programs, supra*, note 26, at 313. By offering tuition payments and stipends to ex-members of the armed forces, the federal government substantially increases the pool of applicants to colleges and universities and enables those institutions at which veterans enroll to concentrate their own financial aid resources on other students. *Bob Jones University* v. *Johnson*, 396 F.Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

In 1965, the Higher Education Act established the Educational Opportunity Grants program ("EOGs") to provide funds for undergraduate students with exceptional financial need. Grants of up to $1,000 or one-half of the amounts provided to the students from other institutional financial aid per year, whichever was less, were possible for up to four years of study.[29] The Education Amendments of 1972 replaced the EOG program with a two-part grant system, Basic Educational Opportunity Grants ("BEOGs") and Supplemental Educational Opportunity Grants ("SEOGs"), Pub. L. No. 92-318, Title IV, Part A, 86 Stat. 248, [1972] U.S. CODE CONG. & AD. NEWS, 92d Cong., 2d Sess. 293-302. Both laws provide grants to students with limited financial resources.[30] These funds,

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[29] In fiscal year 1971, an estimated 290,000 students at 2,100 institutions received EOG assistance. H.R. REP. NO. 554, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & ADM. NEWS, 92d Cong., 2d Sess. 2477.

[30] These funds, available for eligible students in sums based upon Congressional appropriations, have been held to be federal financial assistance to a college sufficient to obligate it under the Department of Education Title IX regulation which requires recipients to file an assurance of compliance with Title IX prior to receipt of such funds. Grove City College v. Harris, 500 F.Supp. 253 (W.D. Pa. 1980), *appeal pending*, Nos. 80-2383, 2384 (3d Cir. 1980).

as was true with the EOG grants, can be used by students to pay their tuition or student fees.[31]

To the extent that these federal funds from the Veterans' Administration and from the Department of Education are used to pay tuition and fees charged the student, universities use those funds to fill their general funding needs. The funds flow into the unrestricted fund categories of the university accounts and can then be used by the institution for any purpose its chooses—faculty salaries, new facilities, library books, heating fuel or any other acceptable expenditure for a college or university.

In sum, large amounts of federal funds are provided to elementary and secondary schools and higher education institutions which in essence constitute general support for their operations. The funds may be used to pay teacher and administrative salaries, build teacher lounges, administration offices and facilities and the like. A finding that the 1972 Congress did not intend to prohibit these federal funds from being used to support employment discrimination flies in the face of Congress' own stated purposes and goals not only in enacting Title IX, but also in its other actions and statements throughout that legislative session.

It defies simple logic to conclude that in the very same year the Congress would have amended Title VII

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[31] Today the BEOG program is enormous. In fiscal year 1979 over $2.3 billion was obligated in grants under the BEOG program. During the 1978-79 award period an estimated 1,800,000 students enrolled in about 6,700 postsecondary schools received Basic Grants (BEOGs). *1979 Catalogue of Federal Domestic Assistance*, Executive Office of the President, Office of Management and Budget, U.S. Government Printing Office, Washington, D.C. 320. The SEOG program operates on a smaller scale, with approximately $340,100,000 in grants obligated in fiscal year 1979, providing assistance to some 573,000 students. *Id.* at 258.

and the Equal Pay Act to cover employment discrimination in schools, declared its concern about the especially grave problems of sex discrimination in employment in schools, passed federal funding statutes naming teachers as well as students as the beneficiaries of the funds, yet excluded employees from protection against discrimination in the use of federal funds. In short, simple logic, as well as the plain meaning of the statute which contains no employment exemption, support the inclusion of employment discrimination within Title IX.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

MARGARET A. KOHN
MARCIA D. GREENBERGER
National Women's
Law Center
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670

Attorneys for *Amici Curiae*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE NORTH HAVEN BOARD OF EDUCATION,
Petitioner,

v.

TERREL BELL, *et al.*,
Respondents,

and

THE TRUMBULL BOARD OF EDUCATION,
Petitioner,

v.

UNITED STATES DEPARTMENT OF EDUCATION AND LINDA POTZ,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE ON BEHALF OF BIRCH BAYH, ROBERT DRINAN, DON EDWARDS, EDITH GREEN, PATSY MINK AND PATRICIA SCHROEDER

JOSEPH ONEK*
PETER SCHEER
Onek, Klein & Farr
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

Counsel of Record

THE CAPITOL PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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Birch Bayh, Robert Drinan, Don Edwards, Edith Green, Patsy Mink and

Patricia Schroeder hereby respectfully move, pursuant to Rules 36 and 42 of this Court's Rules, to file the within brief amici curiae in North Haven Board of Education v. Bell, et al. in support of respondents. Counsel for petitioners have refused to consent to the filing of this brief.

Amici are present and former members of the United States Senate and the House of Representatives who share a long-standing concern for sex equity in education. In addition, Birch Bayh was the sponsor and floor manager of Title IX in the Senate and Edith Green was the sponsor and floor manager of Title IX in the House of Representatives.

Amici believe their brief will be of substantial assistance to the Court in the resolution of the issues presented by this case. The brief will focus on the intent

of the Congress in enacting Title IX and on the role of Title IX in the comprehensive system of federal remedies to combat sex discrimination in education.

Respectfully submitted,

JOSEPH ONEK
PETER SCHEER
Onek, Klein & Farr
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

Counsel for Amici

September 8, 1981.

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INTEREST OF AMICI CURIAE

The interest of amici curiae appears from the foregoing motion.

SUMMARY OF ARGUMENT

In Title IX of the Education Amendments of 1972, U.S.C. § 1681 et seq., Congress addressed comprehensively the problem of sex discrimination in education, broadly prohibiting discriminatory practices in educational programs and activities receiving financial assistance from the federal government. 20 U.S.C. 1681(a). Although certain types of institutions are exempted, 20 U.S.C. 1681(a)(3)-(7), Title IX recognizes no exceptions to the class of potential victims of discrimination who are protected under the statute. By its terms, Title IX's ban on sex discrimination is all-inclusive, extending to any "person" -- both employees as well as students -- who benefit from, or participate in, a federally-funded educational program or activity. Section 1681(a).

Title IX was patterned on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., barring racial and national origin-based discrimination by recipients of federal funds. Cannon v. University of Chicago, 441 U.S. 677, 704 (1979). Conspicuously absent from Title IX, however, is any analogue to section 604 of Title VI, 42 U.S.C. § 2000d-3, which expressly excludes discriminatory employment practices from the scope of the 1964 statute. At issue in this case is whether, despite the absence of such a provision in Title IX, a Title VI-like employment exclusion should nonetheless be read into Title IX. The Court of Appeals correctly held that such an exclusion for employment practices was not implicit in Title IX, and that the Department of Education's regulations promulgated under Title IX, 34 C.F.R. Part 106, Subpart E, are therefore valid. 629 F.2d 773.

We submit this brief to make essentially two points. First, Title IX's application to discrimination in employment is a necessary part of a comprehensive federal scheme to forbid sex discrimination in education. Sections 1681 and 1682 are not merely duplicative of remedies available under other statutes. The fund termination remedy of Title IX, section 1682, is essential to effectuate the purposes of the statute, and to provide an economic disincentive to discriminatory employment practices potentially more potent than the "make whole" compensatory remedies available under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Equal Pay Act, 29 U.S.C. § 206(d). Further, Title IX's coverage of employment is necessary to extend to educational employees the same degree of protection, and the same enforcement mechanisms, that are enjoyed by other sim-

ilarly situated workers under different federal statutes and programs.

Second, the legislative history demonstrates that Congress intended employment practices, as well as admissions and scholarship aid, to come within the scope of Title IX. Senator Bayh, the sponsor of Title IX, stated repeatedly during the debates immediately preceding Senate passage of the Act that Title IX was meant to cover employment. A close reading of these statements makes clear that they referred to sections 901 and 902, 20 U.S.C. 1681 and 1682, and not merely to other portions of the legislation revising Title VII and the Equal Pay Act. Indeed, one year earlier Senator Bayh had introduced a predecessor to Title IX that was also intended to reach employment discrimination, and yet did not contain any of the provisions of the 1972 statute expanding other remedies for employment discrim-

ination. Moreover, the omission from Title IX of Title VI's express exclusion for employment practices was not an oversight or mistake, but reflected a deliberate decision on the part of Congress to include employment in Title IX, as evidenced by the action of the Conference Committee in resolving differences between the Senate and House versions of Title IX. Finally, the Department of Health, Education and Welfare's contemporaneous interpretation of Title IX and subsequent proceedings in Congress offer further evidence that employees were meant to be within the class of persons protected under the 1972 statute.

ARGUMENT

I. TITLE IX'S COVERAGE OF EMPLOYMENT IS AN ESSENTIAL PART OF THE COMPREHENSIVE SYSTEM OF FEDERAL REMEDIES TO COMBAT SEX DISCRIMINATION IN EDUCATION

It has been suggested that Title IX's application to discrimination in employ-

ment is a question of "largely academic interest" in view of amendments to Title VII and the Equal Pay Act to extend certain of those statutes' protections to teachers and other educational employees.1/ Islesboro School Committee v. Califano, 593 F.2d 424, 430 (1st Cir.), cert. denied, 444 U.S. 972 (1979). See also Romeo Community Schools v. H.E.W., 600 F.2d 581, 584 (6th Cir. 1978), cert. denied, 444 U.S. 972 (1979). This is simply incorrect. The protection of employees under Title IX is necessary to effectuate the purposes of the statute and to

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1/ Title VII was amended in 1972 to include coverage of educational activities of educational institutions, 42 U.S.C. 2000e-1, and to remove an exemption for public employers, including public schools, 42 U.S.C. § 2000e(a). Section 13(a) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a), was amended to make the Equal Pay Act, 29 U.S.C. § 206(d), applicable to professional employees, including teachers and educational administrative personnel.

provide full and effective enforcement of the federal ban on employment discrimination in education.

As this Court stated in Cannon v. University of Chicago, supra, 441 U.S. at 704, one of Congress' principal purposes in enacting Title IX was "to avoid the use of federal resources to support discriminatory practices." That purpose would be seriously frustrated if, as petitioners urge, the employment exclusion of Title VI is engrafted onto Title IX. Because Title IX is the only statute dealing with sex discrimination that provides comprehensively for termination of federal funding to educational institutions,[2/] acceptance of petitioners' argument would oblige the federal government to assist

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2/ Neither Title VII nor the Equal Pay Act provide authority for the termination of federal funding.

even those institutions engaging in the most blatant discriminatory employment practices. This enforced subsidy, in the face of a flouting of federal law, is just the sort of investment in discrimination that Congress meant to avoid.

Moreover, Title IX's procedure for the termination of federal financial support is a crucial part of the system of federal remedies set up to combat discriminatory practices and policies in education. 629 F.2d at 785. Termination of federal funds is, of course, a "severe" sanction, Cannon v. University of Chicago, supra, 441 U.S. at 704-05 & n. 38, but therein lies its potency as a deterrent to sex-based discrimination. See generally Justice Delayed and Denied: H.E.W. and Northern School Desegregation, Center for National Policy Review (1974). Even if funding cut-offs are rarely effected in

practice, the very threat of such action -- given the pervasiveness of federal assistance in this area -- can create economic disincentives to discrimination that are more powerful than the "make whole" reinstatement and back pay remedies generally available under other anti-discrimination statutes. See Statement of the U.S. Commission on Civil Rights on Department of Education Appropriations Bill, Before the House Subcommittee on Labor, Health, Education and Welfare of the Committee on Appropriations (April 1, 1980).

Title IX thus does not merely duplicate remedies under Title VII and the Equal Pay Act. Title IX's fund termination authority complements, and adds significantly to, those protections as part of a comprehensive scheme for the enforcement of the federal prohibition on discrimination in education. It is one thing

for an educational institution to engage in sex-based discrimination secure in the knowledge that federal funding will continue anyway; quite another to discriminate at the risk of losing federal aid entirely. Thus, while the Title VII and Equal Pay Act remedies serve largely to compensate persons for past acts of discrimination, Title IX's fund termination remedy operates prospectively, providing an important deterrent by raising the potential costs of discriminatory practices to prohibitive and politically unacceptable levels.

Title IX's coverage of employment is also necessary simply to extend to most educational employees the same protections against discrimination that are provided to other employees under different statutes and programs. Because they are typically public sector employees, teachers and other educational workers may not look

to the Equal Employment Opportunity Commission (EEOC) for assistance in prosecuting a meritorious Title VII claim. The EEOC may attempt to conciliate a complaint brought by a public school employee, but its court enforcement powers are limited to employees in the private sector. See 42 U.S.C. 2000e-5(f).3/ Thus, absent coverage of employment under Title IX, there exists no effective mechanism for direct federal involvement in educational discrimination cases involving public schools, and individual employees will be forced to bear the full cost of expensive and protracted litigation.

Similarly, most educational employees are not subject to the protections of

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3/ The EEOC may refer such cases to the Justice Department. However, the resources of the Justice Department's Civil Rights Division section for fair employment litigation are far less extensive than those available to the EEOC for this purpose.

Executive Order 11246, which prohibits employment discrimination by recipients of federal contracts and, like Title IX and Title VI, is enforced through termination of federal funds. See 41 C.F.R. § 60-1 et seq. The Executive Order does not reach most educational employees because the bulk of federal aid to education -- particularly at the elementary and secondary school levels, where most educational workers are employed -- flows to educational institutions in the form of grants and loans, rather than "contracts," within the meaning of the Executive Order. Thus, exclusion of employment under Title IX would serve to deprive most educational employees of a federal fund termination remedy that is already made available to employees of most major corporations through the Executive Order program.

The existence of multiple remedies dealing with the problem of employment

discrimination in education hardly renders Title IX's coverage of employees redundant or duplicative. Title IX serves additional purposes, and provides additional protections, as Congress was aware in 1972 when it enacted Title IX. In any event, to argue that the existence of other remedies shows a Congressional intent to exclude employment from Title IX is to turn on its head the ordinary presumption that Congress approaches the problem of discrimination from several directions, applying multiple and occasionally overlapping remedies. Alexander v. Gardner-Denver, 415 U.S. 36, 47-49 (1974). See also International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, 429 U.S. 229 (1976). In the area of education, Congress determined that private rights of action were not enough to undo the persistent pattern of employment discrimination on the basis of sex.

Accordingly, Congress sought to provide the additional enforcement mechanisms -- including specifically the fund termination authority -- of Title IX.

II. THE LEGISLATIVE HISTORY MAKES CLEAR THAT TITLE IX WAS MEANT TO COVER EMPLOYMENT PRACTICES, AS WELL AS DISCRIMINATION IN SCHOLARSHIPS, ADMISSIONS AND OTHER AREAS MORE DIRECTLY AFFECTING STUDENTS

The legislative history leaves little room for doubt that Congress intended Title IX to forbid sex discrimination against employees of educational institutions receiving federal funds. As we show below, there is no evidence in the pertinent legislative materials that Congress intended the unqualified language of Title IX to be given anything other than its plain meaning -- to prohibit the exclusion, on grounds of sex, of any "person" from "participation in" and "the benefits of" federally-assisted programs and activities. Section 1681(a). On the

contrary, mindful of the employment exclusion in Title VI, Congress chose not to include a similar provision in Title IX but, rather, to extend Title IX's protections to employees as well as students.

A. Proceedings in the Senate.

Title IX as finally enacted was an amendment (Amendment No. 874) sponsored by Senator Bayh to the Higher Education Amendments of 1972, S.659, 92d Cong., 2d Sess. (1972). What is now Title IX comprised the first four sections of the Bayh Amendment, sections 1001-1004. See 118 Cong. Rec. 5803 (1972). Additional sections consisted of provisions amending, inter alia, Title VII of the Civil Rights Act of 1964 and the Equal Pay Act to make those statutes generally applicable to discrimination against public and professional employees, including teachers.

Sections 1005-1010. Ibid.4/

The views of the sponsor of legislation are entitled to considerable weight in construing Congressional intent. Simpson v. United States, 435 U.S. 6 (1978). In the case of Title IX, Senator Bayh made clear that employment discrimination in education was one of the principal concerns of his amendment and, more particularly, of sections 1001-1004 of the amendment -- the provisions corresponding to what is now Title IX. In introducing the legislation, Senator Bayh stressed the need for effective remedies to combat sex discrimination in hiring and promotion. Senator Bayh deplored the "double stan-

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4/ The provisions of the Bayh amendment revising Title VII, although passed as part of Title IX, were ultimately deleted during codification because the same revisions to Title VII had been enacted as part of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 42 U.S.C. 2000e-1. The 1972 amendments to the Equal Pay Act, see note 1, infra, were enacted as part of Title IX.

dard" of educational institutions refusing to hire women on whom they have conferred degrees. 118 Cong. Rec. 5804. "In spite of high academic standards, a woman who has met the rigorous standards for a Ph.D. program may suddenly find that these same schools do not have sufficient confidence in their own standards to hire the graduate to teach." 118 Cong. Rec. 5804-05.

Senator Bayh also observed that women are discriminated against in promotion and pay, even if they are initially successful in obtaining jobs in the education field. "[T]he rule is that once hired, women do not receive promotion as often as men... [and] those women who are promoted...do not receive equal pay for equal work." 118 Cong. Rec. 5805 (1972). Finally, Senator Bayh explained that his amendment was directed to discrimination against administrative personnel, as well as teachers. Citing statistics on the under-

representation of women among elementary and high school principals, Senator Bayh stated that "preference for men over women to fill administrative posts is...clear." Ibid.

Petitioners do not dispute that at least some portions of the Bayh amendment were intended to reach teachers and other educational employees. However, they contend that Senator Bayh's statements concerning the legislation's coverage of employment -- as contrasted to his statements concerning discrimination in school admissions and scholarships -- do not relate to the first part of his amendment, sections 1001-1004, but instead relate only to subsequent sections revising Title VII and the Equal Pay Act. This strained interpretation of the sponsor's remarks is simply incorrect, and was properly rejected by the Court of Appeals.

Senator Bayh's intentions were made clear at the outset of the Senate debates. In introducing his proposed amendment, he stated that sex discrimination was a problem that reached "into all facets of education," specifically including "admissions, scholarship programs, faculty hiring and promotion, professional staffing and pay scales." 118 Cong. Rec. 5803 (1972) (emphasis added). He then summed up the provisions of his amendment as follows:

> [T]he heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions. Enforcement powers include fund termination provisions -- and appropriate safeguards parallel to those found in Title VI of the 1964 Civil Rights Act. Other important provisions in the amendment would extend the equal employment opportunities provisions of Title VII of the 1964 Civil Rights Act to educational institutions, and extend the Equal Work Act to include executive, administrative and professional women. 118 Cong. Rec. 5803 (1972) (emphasis added).

Senator Bayh thus explicitly stated that the "heart of this amendment," the first four sections consisting of Title IX, was intended to cover "faculty employment," as well as discrimination more specifically directed to students. That Senator Bayh was speaking of Title IX in the first part of the quoted passage is made clear by his statements concerning Title IX's "limited exceptions" for specified classes of educational institutions, the similarity of his proposal to Title VI, and the applicability of the provisions to schools "receiving Federal funds." The amendments to Title VII and the Equal Pay Act were discussed separately as "other important provisions in the amendment," a reference to sections 1005 to 1010. The phrase "other important provisions" would make no sense if Senator Bayh's earlier statement concerning the

amendment's coverage of employment discrimination is viewed as referring to the proposed changes in Title VII and the Equal Pay Act.

Title IX's intended application to employment practices was again underscored in a comprehensive summary of the amendment read by Senator Bayh during the Senate debates. 118 Cong. Rec. 5806-08 (1972). For purposes of his analysis, Senator Bayh divided the amendment into four sections -- the first dealing with the Title IX provisions, the second dealing with the amendments to Title VII and the Equal Pay Act, the third dealing with provisions of the amendment authorizing federal studies of sex discrimination in education, and the fourth dealing with amendments to allow participation by the Attorney General in certain sex discrimination suits. Although the headings alone of these sections may suggest a con-

trary inference,5/ the substance of Senator Bayh's comments make clear that discrimination in employment was to be dealt with by both the Title IX provisions and the sections amending Title VII and the Equal Pay Act. In discussing the Title IX provisions, Senator Bayh described the provisions' scope both with respect to the types of institutions covered -- including a discussion of Title IX's express exemptions -- and with respect to the types of discrimination covered. In this latter regard, Senator Bayh's remarks confirm Title IX's application to employment. Senator Bayh stated:

> This portion of the amendment covers discrimination in all areas where abuse has been mentioned --

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5/ The heading for the first section of the summary was "Prohibition of Sex Discrimination in Federally Funded Education Programs." The heading for the second section, dealing exclusively with employment discrimination, was "Prohibition of Education-Related Employment Discrimination." 118 Cong. Rec. 5807 (1972).

> employment practices for faculty and administrators, scholarship aid, admissions, access to programs within the institutions such as vocational classes, and so forth. The provisions have been tested under Title VI of the 1964 Civil rights Act for the last 8 years so that we have evidence of their effectiveness and flexibility. 118 Cong. Rec. 5807 (1972) (emphasis added).

Petitioners' position also cannot be squared with Senator Bayh's statements in response to questions raised by other senators during the debate on the Senate floor. Senator Pell, inquiring about the Title IX provisions, asked whether the Bayh amendment would forbid discrimination in employment at certain private schools, which were otherwise exempted from the Title IX provisions in their admissions policies. 118 Cong. Rec. 5812-13 (1972). Senator Bayh answered that his amendment would generally prohibit all employment discrimination in education, including discrimination by private schools permitted under the amendment to continue their

single-sex admissions policies. However, he added that certain institutions -- specifically parochial schools and military academies -- were exempted in all respects from the provisions of Title IX, and therefore were not required to make any changes in their employment practices.

In relevant part, the exchange between Senators Bayh and Pell was as follows:

> MR. PELL. . . . Sections 1001(a) and (b) include all educational institutions which receive Federal assistance. This includes elementary and secondary schools as well. With regard to private undergraduate colleges, the Senator has excluded from coverage their admissions practices. Does the same exclusion apply to non-public institutions at the elementary and secondary level?
>
> MR. BAYH. At the elementary and secondary levels, admissions policies are not covered. As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an

institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever.

In the area of employment, we permit no exceptions. In the area of services, once a student is accepted within an institution, we permit no exceptions. The Senator from Rhode Island asked about admissions policies of private secondary and primary schools. They would be excepted.

* * * *

MR. PELL. . . . [D]o I understand the Senator to say that the faculty of private schools would have to reflect a sexual balance?

MR. BAYH. This amendment sets no quotas. It only guarantees equality of opportunity. The Senator from Indiana cannot be sure about the sexual balance in any faculty, but as far as employment opportunities are concerned, the answer would be "Yes."

* * * *

MR. PELL. Would this apply to a parochial school where they have nuns as teachers?

MR. BAYH. No. There is an explicit exception for educational institutions controlled by a religious organization.

* * * *

> MR. PELL. Mr. President, I refer to a preparatory school such as Peekskill Military Institute which is at the high school level. Would that school be expected to have women teachers?
>
> * * * *
>
> MR. BAYH. All military schools are excluded.

These statements by Senator Bayh, the sponsor of Title IX, made immediately before Senate passage of his amendment, simply cannot be dismissed as an imprecise "digression," as petitioners contend. There is no mistaking that Senator Bayh's remarks refer to Title IX -- he is discussing the scope of exemptions that were not part of the amendments to Title VII and the Equal Pay Act. Similarly, there is no mistaking that he is stating that Title IX applies to employment. As the Court of Appeals noted, 629 F.2d at 782, Senator Bayh's discussion of the exemptions in Title IX cannot be interpreted in any other way. The statement that the employment practices of certain institutions are

exempt from Title IX obviously makes no sense unless employment practices in general are covered under the statute. Ibid.6/

Finally, Senator Bayh's previous legislative efforts confirm that his intention to prohibit employment discrimination was not confined to the sections of his amendment revising Title VII and the

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6/ Moreover, Senator Bayh reaffirmed these statements several months later by publishing in the Congressional Record an analysis of Title IX prepared by Bernice Sandler of the Association of American Colleges. Discussing differences between Title IX and Title VI, the analysis stated:

> [T]he Higher Education Act differs from Title VI in that the sex discrimination prohibition is limited to federally assisted education programs and activities, whereas the race, color and national origin discrimination prohibitions are applicable to all federally assisted programs. Title VI also specifically excludes employment from coverage (except where the primary objective of the federal aid is to provide employment). There is no similar exemption for employment in the sex discrimination provisions relating to federally assisted education programs. 118 Cong. Rec. 24684 n. 1 (1972) (emphasis added).

Equal Pay Act. In 1971 Senator Bayh sought unsuccessfully to amend a higher education bill with a provision similar to Title IX.7/ The 1971 proposal contained provisions identical to sections 901 and 902 of Title IX, 20 U.S.C. 1681 and 1682, barring sex discrimination in educational institutions receiving federal financial assistance, and authorizing the termination of such assistance. 117 Cong. Rec. 30156 (1971). The proposal also contained additional provisions permitting intervention by the Justice Department in certain sex discrimination suits, and authorizing a study on sex discrimination in higher education. 117 Cong. Rec. 30156-57 (1971). Significantly, however, the 1971 amendment did not contain provi-

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7/ The provision, Amendment No. 398 to S.659, was not voted on by the Senate because it was ruled "nongermane." 117 Cong. Rec. 30412 (1971).

sions paralleling the sections in the 1972 amendment revising Title VII and the Equal Pay Act to make those statutes generally applicable to educational employees.

If petitioners were correct that Title IX applies to employment discrimination only through its amendments to Title VII and the Equal Pay Act, then employment discrimination should have been clearly beyond the scope of Senator Bayh's 1971 proposed amendment, which did not contain provisions affecting these other statutes. On the contrary, however, the 1971 proposal was unquestionably meant to cover discrimination in employment, as well as discrimination in admissions and scholarships.

In describing the problem to which his amendment was directed, Senator Bayh stated that "While over 50 percent of our population is female, there is no effective protection for them as they seek admission and employment in educational

facilities." 117 Cong. Rec. 30155 (1971). After discussing discrimination in admissions, Senator Bayh stated, "Today, women seeking employment in higher education face an array of obstacles almost as insuperable as those which use to face blacks." 117 Cong. Rec. 30156 (1971). Senator Bayh concluded: "[J]ust as in other professions an old axiom applies, the higher the rank, the fewer the women." Ibid.

In sum, Senator Bayh's repeated statements on the Senate floor reflect a clear and unmistakable understanding that employment practices of federally-funded educational institutions were meant to be within the scope of Title IX.

B. Proceedings in the House of Representatives and the Action of the Conference Committee.

The version of Title IX that was passed by the House of Representatives was part of amendments to the Higher Education

Act of 1965, H.R. 7248, and was considered simultaneously with the Senate's passage of Title IX. The House bill was substantially similar to the Bayh amendment passed by the Senate. For present purposes, however, there was one key difference between the two bills -- the House version did contain a counterpart to section 604 of Title VI, expressly excluding employment from the coverage of Title IX. In the Conference Committee, however, this exclusion provision was dropped in favor of the Senate version of Title IX. The report of the Conference Committee explained the deletion as follows:

> [T]he House amendment, but not the Senate amendment, provided that nothing in the Title authorizes action by any department or agency with respect to an employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. The House recedes. H.R. Rep. No. 92-1085, 92d Cong. 2d Sess. 221 (1972) (emphasis added).

The decision of the Conference Committee demonstrates that the omission from Title IX of a Title VI-like exclusion for employment practices was not an oversight or mistake, but rather reflected a deliberate decision to include authority for federal fund termination as one of the remedies for employment discrimination in education. The Senate and the House had disagreed over the inclusion of this remedy, and the position of the Senate prevailed in the Conference Committee through deletion of the employment provision in the House bill. Petitioners are simply asking this Court to reverse the resolution of the issue that was reached in the Conference Committee and ratified by the full Congress.

Two arguments are advanced in an attempt to show that the Conference committee action should not be accorded any weight in interpreting Title IX. The

first is that the employment exclusion had to be deleted since it was "inconsistent" with the other provisions of Title IX revising Title VII and the Equal Pay Act. See Islesboro School Committee v. Califano, supra, 593 F.2d at 428; Romeo Community Schools v. H.E.W., supra, 600 F.2d at 584. As the Court of Appeals correctly noted, however, any inconsistency between the exclusion provision and the later sections of the statute could have been easily cured by the addition of qualifying language limiting the effect of the exclusion section to section 901 of Title IX. 629 F.2d at 783. It is hardly reasonable to assume that Congress deleted a provision whose substance it intended to retain simply to avoid a drafting "mistake" that could have been corrected by substitution of the words "section 901" for "title" at the begining of the exclusion provision. At the very least, one

would expect some indication in the legislative history that this inclusion-by-omission was what the Conference Committee had in mind.

A second argument is that deletion of the employment exclusion should be accorded no weight because the exclusion provision itself was a redundancy. According to this position, Congress in enacting Title VI in 1964 viewed section 604 of that statute as merely confirming an exclusion of employment that would have been effective even in the absence of the express provision. Thus, an employment exclusion in Title IX was unnecessary to carry forward to that statute Title VI's implicit exclusion.8/ This argument,

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8/ The argument derives from a statement by Senator Humphrey, during the debate on Title VI, that section 604 "made a number of points clearer and more specific" and that the sponsors had thereby "expressed in specific legislative language what had always been intended." 110 Cong. Rec. 12707 (1964).

however, is also without merit. Whatever may have been Congress' implicit understanding in 1964 with respect to the coverage of Title VI, that understanding cannot be imputed to a different Congress with respect to a different statute eight years later. Even assuming that section 604 was unnecessary to effect exclusion of employment from Title VI, in 1972 that express exclusion was operative and had to be addressed by Congress in any new legislation patterned on Title VI.9/ In enacting Title IX, Congress did address

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9/ In this connection we note that Congress has in other statutes enacted nondiscrimination provisions similar to section 601 of Title VI. In some cases these statutes contain the employment exclusion of section 604, see, e.g., the Age Discrimination Act of 1975. 42 U.S.C. 6103 (c)(1), and in other cases the employment exclusion has been omitted, see, e.g., section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, section 612 of the Comprehensive Employment and Training Programs Act of 1973, 29 U.S.C. 991. The alternate retention and omission of the exclusion section confirms that Congress does not regard such provisions as implicit in all statutes modeled on Title VI.

the Title VI exclusion for employment, ultimately deciding to remove it from the 1972 legislation. Congress thus deliberately extended the remedies of Title IX to discrimination in employment.

C. Subsequent Developments.

Developments subsequent to the enactment of Title IX also confirm the Congressional understanding that the statute was meant to cover discriminatory employment practices.

On June 20, 1974 the Department of Health, Education and Welfare issued its notice of proposed rulemaking for the Title IX regulations, 30 Fed. Reg. 22228 (1974), setting forth, inter alia, the employment discrimination regulations which now appear as subpart E of the Department of Education's regulations, 34 C.F.R. 106.51 et seq. Whatever may be the views of the Secretary of Education

today,10/ these proposed regulations covering employment are entitled to deference as reflecting the contemporaneous interpretation of Title IX by the executive branch agency charged with responsibility for administering the statute. See Zuber v. Allen, 396 U.S. 168, 192-93 (1969); Udall v. Tallman, 380 U.S. 1, 16 (1965); Power Reactor Development Co. v. Int'l Union of Electrical Workers, 367 U.S. 396, 408 (1961). Significantly, the proposed regulations, although highly controversial in other respects, were never questioned for their asserted coverage of employment practices. Of the nearly 10,000 comments received by HEW during the notice and com-

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10/ Amici understand that the Department of Education is now considering revising the Title IX regulations to conform with petitioners' views. Even if the Department proceeds with such a revision, it is apparent that such an administrative after-thought would say little about the original meaning of Title IX.

ment period, 40 Fed. Reg. 24128 (1975), not one doubted that the agency was required by Title IX to issue regulations protecting employees as participants in, or beneficiaries of, federally-assisted educational programs. See Hearings Before the Subcommittee on Post-Secondary Education of the Committee on Education and Labor, House of Representatives, 96th Cong., 1st Sess. 479 (1975). It is also significant that the Title IX regulations were proposed and adopted by an administration not noted for its efforts to expand the authority of federal agencies beyond requirements set Congress. The Secretary of HEW at the time the Title IX regulations were adopted was Caspar W. Weinberger. The Commissioner of Education was Terrel Bell, the current Secretary of the Department of Education.

Moreover, subsequent to the adoption of the Title IX regulations, Congress repeatedly turned a deaf ear to legislative proposals that would have specifically disapproved of HEW's interpretation of Title IX. In 1975 Congress examined the Title IX regulations under a statutory review procedure which at that time provided that new regulations would become effective 45 days after transmittal unless the Congress, by concurrent resolution, found that the regulation was inconsistent with the statute on which it was based. 20 U.S.C. 1232(d)(1)(Supp. IV 1974). In the Senate, Senator Helms introduced such a resolution, calling for disapproval of all of the Title IX regulations, including subpart E. 121 Cong. Rec. 17301 (1975). In the House, Representatives Quie and Erlenborn introduced a related proposal, specifically disapproving of the employment sections of the Title IX regulations

as inconsistent with Title IX. 629 F.2d at 783. Significantly, neither of these measures was ever reported out of the committees to which they were referred.11/

11/ Then-Secretary Weinberger testified on behalf of HEW in Support of the Title IX regulations. The Secretary stated that he regarded Title IX as unequivocal in its directive to HEW to issue regulations covering employment discrimination. The Secretary observed that Title IX provides that:

> 'No person shall be discriminated against, in, or be excluded from or denied participation in a federally assisted education program or activity on the basis of sex.' I don't see any way you can find that employees do not participate in education programs and activities receiving Federal assistance, and, therefore, they are within the protected class. I don't see any reason for excluding employment under 901. If the Congress wants to exclude employment, it is the simplest thing in the world, but when you say 'no person,' there is no room for us to argue any other intent.

Hearings Before the Subcommittee on Post-Secondary Education of the Committee on Education and Labor, House of Representatives, 96th Cong., 1st Sess., 478 (1975).

Subsequent efforts in Congress to narrow the scope of Title IX fared no better. In 1975 Senator Helms introduced a bill, S.2146, to reinsert into Title IX an employment exclusion similar to the provision that was deleted by the Conference Committee in 1972 from the House version of Title IX. Senator Helms' proposal, however, was not adopted. In 1976 Senator McClure introduced a similar amendment that would have confined Title IX to the "curriculum or graduation requirements" of educational institutions receiving federal financial assistance. 122 Cong. Rec. 28136 (1976). Again, however, Congress took no action.

We recognize, of course, that the failure of Congress to expressly disapprove of an agency's interpretation of a statute does not invariably mean that Congress has approved of that interpretation. See Islesboro School Committee v.

Califano, supra, 593 F.2d at 428 n.3.12/ Nonetheless, we submit that the pattern of Congressional inaction here -- in the face of specific legislative proposals to disapprove of the agency's regulations and to exclude employment from Title IX -- is not without significance. In Cannon v. University of Chicago, supra, the Court found that the "absence of legislative action" to alter the persistent "assumption" that Title IX provided a private right of action was evidence of Congressional acquiescence in that assumption. 441 U.S. at 702-03. See also Sibbach v. Wilson & Co., 312 U.S. 1, 14-16 (1941). We think that Congress' inaction is no less meaningful here.

12/ In 1975, after Congress' review of the Title IX regulations pursuant to the Congressional review statute, Congress amended that statute to provide that failure to adopt a concurrent resolution disapproving agency regulations should not be interpreted as approval of such regulations. Pub. L. 94-142 § 7(a)(1), 20 U.S.C. § 1232(d)(1).

CONCLUSION

For the foregoing reasons, amici submit that the decision of the Court of Appeals below should be affirmed.

JOSEPH ONEK
(Counsel of Record)
PETER SCHEER
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

Counsel for Amici

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No. 80-986

IN THE

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OCTOBER TERM, 1980

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LINDA POTZ,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
EDWARD E. POTTER
McGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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LINDA POTZ,

Respondents.

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---

BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council (EEAC), with the written consent of all parties, respectfully submits this brief as Amicus Curiae in support of the Petitioners.[1]

[1] Their consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Although most of EEAC's members are not directly subject to the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (Title IX), the Court's decision in this case can be expected to bear importantly on employers such as EEAC's members that are subject to other similar statutory provisions. Thus, for example, many of EEAC's members participate in federally subsidized programs of various types and therefore are subject to Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504)—a statute which, like Title IX, was modeled after Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* Accordingly, EEAC's members have a substantial interest in the issue presented for the Court's consideration, that is, whether the nondiscrimination provisions of Title IX extend to the general employment practices of recipients of federal financial assistance where the intended beneficiaries of that assistance are not employees.[2]

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[2] Because of its interest in issues arising out of Title IX and Section 504, EEAC filed briefs as Amicus Curiae in the Court in *Southeastern Community College v. Davis*, 99 Sup. Ct. 2361 (1979); *Cannon v. University of Chicago*, 99 Sup. Ct. 1946 (1979); and *University of Texas v. Camenisch*, 49 U.S.L.W. 4468 (U.S. April

SUMMARY OF ARGUMENT

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (Title IX), was modeled after Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* (Title VI), and uses identical words to define the scope of its jurisdiction. The court below placed inappropriate weight, however, on the fact that clarifying language similar to that found in Section 604 of Title VI—stating that Title VI applies to employment practices only if employees were the intended beneficiaries of federal funds—was deleted from the House version of Title IX when the House and Senate bills were in Conference.

The Second Circuit was incorrect for several reasons. First, the language of Section 901 is limited, on its face, to the intended beneficiaries of federal assistance and does not include employees in general. *Islesboro School Committee v. Califano*, 593 F.2d 424 (1st Cir. 1979). Second, and more importantly, the legislative history of Section 601 of Title VI, upon which Section 901 was modeled, indicates that Section 601 was to be limited in coverage to intended beneficiaries of the federal program. Section 604, which permits coverage of only those employees who were the intended beneficiaries of the program, merely clarified the intent of the writers of Section 601. Its inclusion in Title VI, therefore, was unnecessary and the scope of Title VI would not have been changed had Section 604 been omitted. Thus, in view of the established meaning of Section 601, it was not necessary that the statute contain an affirmative statement that it excluded employment practices from its ambit. This con-

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29, 1981). On numerous other occasions, EEAC has filed briefs amicus curiae in this Court on other significant equal employment issues. *See, e.g., Int'l Bro. of Teamsters v. United States*, 431 U.S. 324 (1977); *United Airlines v. Evans*, 431 U.S. 553 (1977); *Great American Federal Savings & Loan Ass'n v. Novotny*, 99 Sup. Ct. 2345 (1979); and *Texas Department of Community Affairs v. Burdine*, 101 Sup. Ct. 1089 (1981).

clusion is reinforced by the fact that the House Committee considering Title IX failed to adopt a Justice Department proposal which would have applied Title IX to discriminatory employment practices in general, and later, the Senate rejected a version of Title IX introduced by Senator McGovern which would have expanded the bill specifically to include employment practices.

Third, the Senate version of Title IX was derived from the House bill, which was, in part, a marked up copy of Title VI. Moreover, the legislative history of Title IX in both the House and Senate clearly demonstrates that it was divisible into two parts: (1) those nondiscrimination provisions relating to the intended beneficiaries of financial assistance, and (2) those relating to discrimination in general employment practices which were to be regulated under Title VII of the 1964 Civil Rights Act (Title VII) and the Equal Pay Act. To have included beneficiary employees within the protection of Section 901 would have been inconsistent with the overall structure of Title IX.

HEW's Title IX regulations covering general employment practices, moreover, are inconsistent with the program specific scope of Section 901 and the pinpoint termination procedures of Section 902 in that the regulations encompass employees who are not necessarily intended beneficiaries of financial assistance. Importantly, this Court in *Cannon v. University of Chicago*, 99 Sup. Ct. 1946, 1955 (1979), in finding a private right of action under Title IX, did so based on a recognition of Title IX's "unmistakable focus on the benefited class" rather than "a ban on discriminatory conduct by recipients of federal funds."

Finally, the Court should not be persuaded by the government's argument below that employment discrimination that somehow assertedly "infects" the rights of student beneficiaries can be relied upon to expand the coverage of the plain meaning of the statute to cover general employment practices. The complaints did not allege that the complainants were the intended beneficiaries of

federal assistance or even that they were employed in federally funded programs for the benefit of students. Also, the isolated employment discrimination alleged does not affect student beneficiaries, and the government's assertion to the contrary is inappropriately raised in this case. Further, the language of the Department of Health, Education and Welfare (HEW)[3] regulations at issue does not establish an infection doctrine, and it would be inappropriate for the Court to read into those regulations a broader meaning than the express words and intent of the agency when it promulgated them.[4] *Romeo Community Schools v. HEW*, 438 F.Supp. 1021, 1034 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

ARGUMENT

I. SECTION 901 OF THE EDUCATION AMENDMENTS OF 1972 DOES NOT AUTHORIZE THE DEPARTMENT OF EDUCATION TO REGULATE THE GENERAL EMPLOYMENT PRACTICES OF RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE.

Although written broadly, Section 901, 20 U.S.C. § 1681, addresses itself only to sex discrimination against the participants and the beneficiaries of federally assisted programs. The discrimination prohibition is stated unequivocally and unambiguously:

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[3] HEW's functions under Title IX were transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678. For purposes of editorial simplicity, this brief will refer to HEW throughout since the relevant actions were taken by HEW prior to the reorganization.

[4] At the time of the decision of the trial court, HEW's Title IX employment regulations appeared at 45 C.F.R. Part 86, Subpart E, §§ 86.51-86.61. They were recodified in connection with the establishment of the Department of Education, 45 Fed. Reg. 30802, 30962-64 (May 9, 1980), and ultimately will be found at 34 C.F.R. Part 106, Subpart E.

> No person in the United States shall, on the basis of sex, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

The wording chosen by Congress makes unmistakably explicit that Section 901 is designed to protect from sex discrimination only those persons for whose benefit the federally funded programs are established. *Brunswick School Board v. Califano*, 449 F. Supp. 866, 870 (D. Maine 1978), *aff'd sub nom. Islesboro School Committee v. Califano*, 593 F.2d 424 (1st Cir. 1979); and *Romeo*, 438 F. Supp. at 1031. It does not by its terms regulate the general employment practices of recipients in circumstances in which employees are not the intended beneficiaries of federal monies.

The Second Circuit erroneously concluded, however, contrary to every other court of appeals and district court that has considered the validity of Subpart E of HEW's Title IX regulations, that Title IX's legislative history supported HEW's regulation of the general employment practices of recipients.[5] But in examining the legislative history to determine the jurisdictional scope of Title IX, the court of appeals overlooked the legislative history of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* (Title VI), as the source for establishing the meaning of the identical words in Title IX. It also failed to recognize and place proper weight on the chronological development of the final version of Title IX of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 373 *et seq.*, which clearly shows that the House Title IX bill—the development of which preceded the Senate bill by several months—was the primary source of the enacted language. It was therefore inappropriate for the court below to have relied on the am-

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[5] See the court decisions cited in Pet. for Cert. 5-8.

biguous legislative history of the Senate bill as being determinative of the meaning and scope of Title IX.

As this Court recognized in *Cannon v. University of Chicago*, 99 Sup. Ct. 1946, 1956 & n. 16 (1979), Title IX was modeled after Titie VI. The description of the benefited class in Section 901 of Title IX is identical to that in Section 601 of Title VI, 20 U.S.C. § 2000d, except that the word "sex" is substituted for the words "race, color, or national origin" found in Title VI. *Id.* at 1956-57. Both statutes, moreover, adopt the same administrative scheme for terminating federal financial assistance "in the particular program, or part thereof" in which discrimination of intended beneficiaries by the recipient institution is found. *Compare* 20 U.S.C. § 1682 *with* 42 U.S.C. § 2000d-1. The only difference between the two statutes is the omission from Title IX of the following language found in Section 604 of Title VI, 42 U.S.C. § 2000d-3 (hereafter "Section 604" language):

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any practice of any employer, employment agency, or labor organization *except where a primary objective of the Federal financial assistance is to provide employment.* (Emphasis added.)

But as virtually all courts except the Second Circuit have held, the legislative histories of Titles VI and IX clearly establish that the deletion of the Section 604 language from the House version of Title IX in the Conference Committee did not expand the scope of Section 901 to include employees who are not the intended beneficiaries of federal assistance or who are employed simply to assist in the delivery of benefits to the intended beneficiaries.

A. The Legislative History of Section 601 of Title VI, From Which Section 901 of Title IX Was Derived, Shows That Even Without Section 604's Language Limiting the Employment-Related Scope of Title VI, Section 601 Did Not Encompass Employees Unless They Were the Intended Beneficiaries of Financial Assistance.

As stated above, both Title VI and Title IX use the same words in Sections 601 and 901 to describe their coverage. Since the words used in Section 901 are derived from Title VI, their meaning as reflected in Title VI's legislative history is relevant in determining the scope and meaning of Section 901. *See Cannon*, 99 Sup. Ct. at 1956 n. 16 ("The genesis of Title IX also bears out its kinship with Title VI").

In the original Administration bill proposing the Civil Rights Act of 1963, Section 601 of Title VI included a provision prohibiting employment discrimination in programs receiving federal assistance.[6] Subsequently, during the summer of 1963, the Administration drafted a new version of the Civil Rights Act containing the language now found in Section 601, which did not expressly provide that Title VI extended to employment practices. All provisions relating to employment, however, were placed in an expanded Title VII.[7] *Even before Section 604 was added to Title VI*, both Houses of Congress and the Justice Department understood that this revision of Title VI was intended to protect only beneficiaries of federal programs, but not those employed to provide those benefits.[8] Indeed, in a letter in response to a specific question

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[6] *See* S. 1731, 88th Cong., 1st Sess. (1963), *as reported in Cannon*, 99 Sup. Ct. at 1956 n. 14.

[7] H.R. 7152, 88th Cong., 1st Sess. (1963).

[8] *See Hearings on S. 1731 and S. 1750 Before the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. (1963) (hereafter *Senate Judiciary Committee Hearings*) at 331, 335 (remarks of Sen. Ervin); *Hearings on H.R. 7152 Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess. (1964) (hereafter *House Judiciary*

on this point from Senator Cooper, Attorney General Robert Kennedy, the Administration's primary spokesman on the Civil Rights Act, stated:

> 3. Question. Would section 602 cover an employer who receives funds under a Federal program and who discriminates in his employment practices?
>
> Answer. Generally no. Title VI is limited in application to instances of *discrimination against the beneficiaries* of Federal assistance programs as the language of section 601 *clearly* indicates. Where, however, employees are the *intended* beneficiaries of a program, Title VI would apply. Thus, for example, creation of job opportunities is one of the major purposes of the accelerated public works program. Hence construction employees would be deemed beneficiaries of such a program and section 602 would require the administering agency to take action to prohibit racial discrimination against them in such a program. On the other hand, the Agricultural Adjustment Act and acreage allotment payments under it is a commodity program having nothing to do with farm employment. Farm employees are not beneficiaries of that program, and section 602 would not authorize any action to require recipients of acreage allotments to refrain from racial discrimination in employment. (Emphasis added.)

110 Cong. Rec. 10076 (1964).

Notwithstanding these clear and unequivocal statements of Administration representatives and other proponents

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Committee Hearings) at 2685 (testimony of Attorney General Kennedy), 2774 (letter from Deputy Attorney General Katzenbach to Rep. Celler); *Hearings on H.R. 7152 Before the House Comm. on Rules*, 88th Cong., 2d Sess. (1964) (hereafter *House Rules Committee Hearings I*) at 141, 198, 200 (remarks of Rep. Celler), 228-230 (remarks of Rep. McCulloch); 110 Cong. Rec. 1518-19 (1964) (remarks of Rep. Celler); *id.* at 1602 (remarks of Rep. Mathias); and *id.* at 10076 (letter from Attorney General Kennedy to Sen. Cooper).

of the Civil Rights Act that Title VI did not apply to employment except in the limited circumstance where employees are the *intended* beneficiaries of a program, at least one opponent of Title VI construed its words to include both employees as well as beneficiaries.[9] Thus, when the Senate began consideration of H.R. 7152 (which had passed the House of Representatives), in order to clarify the intended meaning of the House bill, the Dirksen-Mansfield substitute (which eventually became the Civil Rights Act of 1964) was offered to improve upon the draftsmanship of the House bill.[10] Consistent with the objectives of making "a number of points clearer and more specific" and "express[ing] in specific legislative language what always has been intended",[11] Section 604 was added. As noted by Senator Humphrey, the Senate floor leader for the Civil Rights Act:

> We have made no changes of substance in title VI. . . . We have made several minor adjustments and, in addition, we have modified the language to make explicit the declared intention of this title.[12]

With respect to the new Section 604, he stated that: "This provision is in line with the provisions of section 602 and serves to spell out more precisely the declared scope of coverage of the title." [13]

Thus, Section 604 merely made clear what always had been intended by the words in Section 601 that "[n]o person . . . shall . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any [federally assisted] program or activity."

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[9] *See House Rules Committee Hearings 1* at 379-80 (remarks of Rep. Poff); and 110 Cong. Rec. 2484-85 (1964) (remarks of Rep. Poff).

[10] 110 Cong. Rec. 12707 (1964) (remarks of Sen. Humphrey).

[11] *Id.*

[12] *Id.* at 12714.

[13] *Id.* at 12720. *See also Hearings on H.Res. 789 Before the House Committee on Rules*, 88th Cong., 2d Sess. (1964) at 6, 7 (testimony of Rep. Celler).

That is, Section 601 covers intended beneficiaries under such programs but does not encompass persons employed in connection with such programs unless the primary purpose of the federal assistance is the creation of jobs. *See Ass'n Against Discrimination v. City of Bridgeport*, 25 EPD ¶ 31,714 at p. 20,101 (2d Cir. 1981).[14] The legislative history of Title VI clearly demonstrates, therefore, that the presence or absence of Section 604 in Title VI was superfluous in determining the scope and meaning of Section 601.[15]

Because the language defining the scope of Section 901 is derived from Section 601,[16] the applicability of Title IX to general employment practices is the same as under Title VI unless the legislative history of Title IX shows a clear and unambiguous legislative intent to the contrary. Even though Title IX does not contain express language equivalent to Section 604, a review of its legislative history does not reveal any intent to change the meaning of the words in Section 601 which also define the jurisdictional scope of Title IX.

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[14] *See also Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1235 (7th Cir. 1980); and *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672, 674 (8th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3251 (U.S. 1980) and the Title VI legislative history cited therein. Both appeals courts found that the legislative history of Title VI lends strong support to the conclusion that Congress did not intend protection under Title VI to any person other than an intended beneficiary of federal financial assistance. And *see United States v. Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981); and *Trageser v. Libbie Rehabilitation Center*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 977 (1979).

[15] *See* pp. 8-10 & n. 8, *supra*.

[16] *See Cannon*, 99 Sup. Ct. at 1956 n. 16.

B. The Legislative History of Title IX Shows That Congress Intended To Give the Same Meaning to the Words in Section 901 As Are Contained in Section 601 of Title VI.

The genesis of Title IX was in hearings in 1970 on Section 805 of H.R. 16098.[17] As proposed, Section 805 would have: (1) added the word "sex" to the forms of discrimination prohibited in Section 601 of Title VI (Section 805(a)); (2) amended Title VII of the Civil Rights Act of 1964 to remove the exemption for those employed in educational institutions (Section 805(b)); (3) amended the Civil Rights Act of 1957, 42 U.S.C. 1975c, to extend the jurisdiction of the Civil Rights Commission to include sex discrimination (Section 805 (c)); and (4) amended the Equal Pay Act to remove the exception for executive, administrative and professional personnel (Section 805(d)).[18]

Thus, like the legislative package of nondiscrimination provisions relating to educational institutions that was finally enacted as Title IX, Section 805 was a multi-part bill designed to address both sex discrimination in employment (Section 805(b) and (d)) and sex discrimination occurring with respect to the intended beneficiaries of federal financial assistance (Section 805(a)). Since the latter involved an amendment to Title VI, *Section 604 would have also applied.* Indeed, most of the testimony offered in support of Section 805 related to sex discrimination in employment in educational institutions, particularly at the university level. Each witness who testified regarding employment discrimination did so referencing the employment provisions of the bill, that is, those

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[17] *See Hearings on Section 805 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970) (hereafter *House Title IX Hearings*).

[18] Section 805(a) later became Sections 901 to 903 in the enacted Title IX; Section 805(b) became Section 906; Section 805(c) was subsequently dropped; and Section 805(d) became Section 908.

amending Title VII and the Equal Pay Act.[19] No witness tied the amendment of Title VI to employment, except to the extent that employment was the primary purpose of federal assistance, and those witnesses who discussed the applicability of Section 805(a), including the HEW witness, did so only in the context of that provision's protection of student beneficiaries.[20]

The Justice Department, moreover, testified that it could not support the legislation in the form then under consideration, but suggested an alternative that would have provided HEW jurisdiction over employment practices. Under its proposal, Title VI, Title VII and the Equal Pay Act would not have been amended. Instead, a new statute would have been enacted containing language virtually identical to that in Section 601 of Title VI but specifically providing for jurisdiction over employment activities associated with those programs.[21] Thus, in view of the unambiguous legislative history concerning the meaning and scope of Section 601 which it had had a major part in drafting, the Justice Department recognized that Section 601 did not include coverage of employees except with respect to federally subsidized jobs programs, and that jurisdiction over the general employment practices of recipients required an explicit provision providing for such coverage.

Subsequently, in early 1971, without any expressed intent to change the purpose of H.R. 16098 or the meaning of the words in Section 601, the House Education and Labor Committee "marked up" a copy of Title VI as part of the bill later re-introduced as H.R. 7248 in the Ninety-Second Congress—the House version of the bill eventually enacted as Title IX.[22] In doing so, con-

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[19] *See House Title IX Hearings* at 8-9, 27, 79, 128, 154, 159, 304-305, 379, and 452-53.

[20] *Id.* at 210-11, 305-06, 379, 750.

[21] *Id.* at 678-91.

[22] H.R. 7248, 92d Cong., 1st Sess. (1971) *as reported in* H.R. Rep. No. 92-554, 92d Cong., 1st Sess. (1971). The section numbers

sistent with the Committee's intent that the sex discrimination title would not encompass employment discrimination in federally funded programs except in limited circumstances, the Section 604 language was included as Section 904.[23] As a matter of legislative draftsmanship its inclusion was faulty because H.R. 7248 also included express prohibitions against sex discrimination in the general employment practices of educational institutions by its amendments to Title VII of the Civil Rights Act of 1964 and the Equal Pay Act.[24] The application of neither of these statutes, of course, is limited to employees who are intended beneficiaries of federal funds and the legislative history of Title IX evidences no intent that these amendments were to create such a limitation.

Given the unequivocal meaning of the "no person" language in Section 601 of Title VI, discussed above,[25]

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in both the House and Senate bills were numbered 1001 *et seq.* because the sex discrimination title was then numbered Title X. For purposes of clarity, the section numbers used herein are keyed to the enacted section number, *i.e.*, section 1001 becomes section 901 *et seq.*

[23] Congressman O'Hara subsequently testified in oversight hearings reviewing HEW's Title IX regulations that the reason the Committee drafted a new statute with identical language to Title VI instead of simply amending Title VI was concern that it would open Title VI to hostile amendments as well as the concept it was seeking to extend in the proposed Title IX. "So, to protect the substance of Title VI from hostile amendment, the committee instead wrote a statute embodying the words of Title VI, but substituting the word 'sex' for the word 'race.'" *Hearing on H. Con. Res. 330 Before the Subcomm. on Equal Opportunities of the Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975) (hereafter *Hearing on H. Con. Res. 330*) at 7 (testimony of Rep. O'Hara). Congressman O'Hara also testified: "In the course of the process, certain exceptions were made, largely at the insistence of certain prestigious private colleges and universities, but otherwise *the language and method of Title IX is the language and method of Title VI.*" *Id.* at 8 (emphasis added).

[24] *See* Sections 906 and 908 of H.R. 7248.

[25] *See* pp. 8-11, *supra.*

the inclusion or exclusion of the "Section 604" provision simply does not alter Congress' intent to limit the prohibition against sex discrimination under Sections 901 to 903 of Title IX to intended beneficiaries of federal financial assistance.[26] Clearly then, with or without "Section 604" language, the House version of Title IX was divisible into two parts: (1) those provisions addressing discrimination in general employment practices (Sections 906 and 908), and (2) those provisions addressing discrimination against intended beneficiaries of federal assistance (Sections 901 to 903).

Furthermore, the legislative history regarding the Senate's version of Title IX does not undercut this conclusion in the face of the established meaning of the words found in Section 901, the testimony in the *House Title IX Hearings*, and the intent of the House as reflected in H.R. 16098 as substituted by H.R. 7248. The court below relied almost totally on the ambiguous legislative history of Title IX in the Senate, principally the remarks of Senator Bayh, in construing the scope of Title IX. In doing so, the court of appeals ignored the fact that the words used in Sections 901 to 903 of Title IX are derived from Title VI and that Title VI was the basis of the House bill.

The evolution of the Senate's version of Title IX involved a succession of two different proposals by Senator Bayh. The first—introduced in August 1971—was substantially different from Title IX as enacted, and the Second Circuit's reliance on it to support its conclusion

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[26] In justifying the application of its Title IX regulations to employment, HEW has characterized Section 604 of Title VI as exempting employment under Title VI. *See, e.g., Hearing on H. Con. Res. 330* at 31 (testimony of Gwendolyn Gregory). Section 604, however, is not properly characterized as an "exemption"; rather it simply clarified the meaning of Section 601. More importantly, removal of a negative concept does not operate affirmatively to confer authority where it does not otherwise exist, as the Justice Department substitute for Section 805 of H.R. 16098 recognized. See p. 13, *supra*. In the context of Title IX, the excluded institutions listed in Section 901 constitute the exemptions from coverage.

that Title IX encompasses general employment practices is ill-founded. First, although Senator Bayh stated that "[t]hese provisions are identical to those provided under Title VI of the 1964 Civil Rights Act," (117 Cong. Rec. 30156), a comparison of his amendment and Title VI shows that the scope of his proposal was institutional rather than program specific, and unlike Title VI the proposal contained no pinpoint termination provision.[27] Second, and more significantly, unlike Senator Bayh's second proposal and Title IX as enacted, the first proposal did not include amendments to Title VII and the Equal Pay Act which encompass employment discrimination. Indeed, it is significant to note, as this Court did in *Cannon* that (at the time the first Bayh proposal was being considered), "[i]n adopting Title IX in its present form, in fact, Congress passed over an alternative proposal, offered by Senator McGovern . . . that was phrased quite differently. . . ." 99 Sup. Ct. at 1955 n.14. That amendment used language nearly identical to Section 601 of Title VI but modified it by explicitly providing for jurisdiction over the general employment practices of recipients of federal assistance.[28] Thus, like the Justice Department substitute to Section 805 of H.R. 16098, Senator McGovern recognized that, in order for Title IX to include the employment practices of recipients, express provision needed to be made for it.[29]

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[27] *Compare* 20 U.S.C. § 2000d-1 *et seq.* with S.659 at 117 Cong. Rec. 30404 (1971).

[28] 117 Cong. Rec. 30411. In relevant part the McGovern proposal provided:

> No person in the United States shall be excluded on the grounds of sex from participation in, be denied the benefits of, be subjected to discrimination under *or be denied employment in connection with any program or activity assisted under this Act.* (Emphasis added.)

[29] With no express provision in the first Bayh proposal to show that it encompassed general employment practices, the legislative history associated with it is at best ambiguous as to whether it covered employment. For example, in response to a question from Senator Dominick concerning the meaning of Section 601, Senator

Subsequently, Senator Bayh made a second proposal in February 1972 that *expanded* his first proposal, thereby closely conforming it to H.R. 7248, which had been reported out of the House Education and Labor Committee in October 1971.[30] Thus, while the language of Senator Bayh's first proposal deviated from the actual wording of Title VI, his second amendment, like the House bill, was identical to the first three sections of Title VI. Moreover, like the House bill, it now contained amendments to the employment discrimination provisions of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, and amended the Civil Rights Act of 1957. The fact that Senator Bayh's second proposal did not contain "Section 604" language was not a real difference between the House and Senate bills.

As discussed above, inclusion of "Section 604" language in the House Title IX bill was unnecessary and in fact inconsistent with the overall structure of the proposed statute. More significantly, there is nothing in Senator Bayh's floor statements that directly shows that he intended the "Title VI" provisions of his second proposal to encompass employees. Indeed, in summing up the reasons why the Senate should adopt his proposal, Senator Bayh stated:

> When I proposed an amendment similar to this last August it was ruled "nongermane." *Now I am coming back to the Senate with this comprehensive approach which incorporates not only the key provisions of my earlier amendment, but the strongest points of the antidiscrimination amendments approved by the House.*

118 Cong. Rec. 5808 (emphasis added).[31] Senator Bayh

Bayh stated: "What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school . . . ." 117 Cong. Rec. 30407 (remarks of Senator Bayh).

[30] *See* pp. 13-15, *supra*.

[31] The Second Circuit's analysis of the legislative history of Title IX, therefore, is flawed because it treats as of secondary

thereby made clear the proper basis for the derivation of the meaning and structure of his amendment.

Consequently, the only logical and proper construction of his bill is that it was, like its counterpart in the House, divisible into two parts: (1) those Title VI-related provisions addressing students as intended beneficiaries of financial assistance, and (2) those provisions addressing employment discrimination under Title VII and the Equal Pay Act in which considerations of whether there has been federal financial assistance are irrelevant. When viewed in context, a fair reading of Senator Bayh's remarks introducing his bill, the synopsis of his bill, and the colloquy between Senators Pell and Bayh discussing the bill shows that Senator Bayh "continuously broke down the amendment into separate categories, certain of them dealing with students (Title IX) and others dealing with employees (Title VII and the Equal Pay Act)." [32] *Islesboro School Committee v.*

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importance the House's consideration of Title IX. As the discussion herein and Senator Bayh's statement show, the House bill, H.R. 7248, and the hearings leading to it preceded and established the parameters of the Senate's consideration of Title IX.

[32] *See generally* 118 Cong. Rec. 5803-5813. More particularly: (1) his prepared statement divided the rationale for his bill between discrimination in hiring and promotions and discrimination in admissions and scholarship (*id.* at 5804-5806); and (2) his prepared summary of the bill distinguished between the provisions relating to admissions and those relating to employment (*id.* at 5707-08). His introductory statement (*id.* at 5803) and colloquy with Senator Pell (*id.* at 5812-5813) do not indicate a contrary intent. While the court below construed those remarks as arguing for an overlap in the employment discrimination provisions, his statement that "[c]entral to my amendment are sections 1001-1005" (*id.* at 5807)—Section 1005 being the amendment to include educational institutions under Title VII—clearly demonstrates that Senator Bayh's references to employment discrimination are references to section 1005 rather than the prohibitions in federally assisted programs. *See also Romeo*, 438 F. Supp. at 1030 ("Senator Bayh's quoted assertion of employment discrimination coverage by Title IX in his remarks during introduction of this bill was made in reference to the entire Title IX legislative package including the Title VII and Equal Pay Amendments.").

Califano, 593 F.2d at 427, *cert. denied*, 444 U.S. 972 (1979). Any other construction of the legislative history is inconsistent with the step-by-step development of Title IX of the Educational Amendments of 1972, shown above.

Thus, the court below erred when it concluded, in contrast to every other federal court including the trial court herein, that the need to avoid inconsistency with the comprehensive employment discrimination provisions in Title VII and the Equal Pay Act was an insufficient explanation for the deletion of Section 904 (the "Section 604" provision) from the House bill in Conference. In fact, in view of the development and structure of both the House and Senate bills and the established meaning of the words in Section 901, it is the only logical explanation.

The Second Circuit reached its erroneous conclusion based on its feeling that Congress easily could have drafted an employment exclusion applicable to Sections 901 to 903. As the proposals of the Justice Department and Senator McGovern illustrate, the well-established meaning and scope of Section 601 of Title VI (as well as the intent of the framers of H.R. 7248) necessitated that employment coverage in federally assisted programs be expressly provided for, not expressly excluded.[33]

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[33] For these reasons, the court of appeals' conclusion, that some evidence that employment coverage was intended as shown by the failure of Congress to adopt bills and amendments specifically designed to exempt employment from HEW's regulations, is equally erroneous. Likewise, the failure of Congress to disapprove HEW's Title IX regulations should not be taken as any indication of their validity. For, 20 U.S.C. § 1232 expressly provides that failure of Congress to disapprove regulations promulgated by HEW is not evidence of approval and creates no presumption of validity. Moreover, whereas Title IX was considered and voted on by the entire Congress, hearings before a committee of Congress reviewing regulations hardly constitutes a statement of Congress' intent when it enacted Title IX. *Cf. Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978) (Repeal of acts of Congress by implication are

In sum, Congress provided separate statutes with separate remedies for the protection of intended beneficiaries of federal programs (Title IX) and the protection of employees (Title VII and the Equal Pay Act). Accordingly, only if students as direct beneficiaries are being excluded from participation in a federally assisted program, denied the benefits thereof, or subjected to discrimination under it, and if corrective efforts fail, may the funds to that program be cut off. Cutting off funds for employment-related allegations of discrimination would serve only to deprive innocent student beneficiaries of the educational services the Congress intended them to have, without remedying the alleged discrimination suffered by the employee. Such a result would be particularly anomolous since the sanction is not being imposed for the purpose of protecting the beneficiary's rights. In any event, if an employee has suffered discrimination, she is fully entitled to the employment-related remedies available under Title VII and the Equal Pay Act.

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not favored especially where such an implication is based on committee action).

Furthermore, the Second Circuit's reliance (629 F.2d at 782) on a summary of the requirements of Title IX by Dr. Bernice Sandler, one of the proponents of Title IX, placed in the Congressional Record one month *after* the Higher Education Amendments of 1972 containing Title IX were enacted into law, constitutes post-enactment legislative history to be accorded little weight. *See Intl. Bro. of Teamsters v. United States*, 431 U.S. 324, 354 n. 39 (1977). More importantly, when Dr. Sandler testified before Title IX was enacted with respect to Section 805 of H.R. 16098, she indicated her understanding that the provision amending Title VI to cover sex discrimination in federal programs would have no application to employment practice, but was intended to protect students. *House Title IX Hearings* at 305-06.

II. THE APPLICATION OF SECTION 901 TO THE GENERAL EMPLOYMENT PRACTICES OF RECIPIENTS IS INCONSISTENT WITH ITS PROGRAM SPECIFIC SCOPE AND THE PINPOINT TERMINATION PROVISIONS OF SECTION 902.

A. Section 901 Is Program Specfic and, Therefore, Protects Only the Intended Beneficiaries of Federally Funded Programs and Activities From Discrimination on the Basis of Sex.

Although Title IX prohibits sex discrimination in any "education program and activity receiving Federal financial assistance," 20 U.S.C. § 1681, HEW broadly construes its authority to include regulating all employment practices even in circumstances in which the program does not receive federal funds and employees are not intended beneficiaries. This Court stated, however, in finding a private right of action under Title IX in *Cannon:*

> There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX *with an unmistakable focus on the benefited class*, had written it simply to a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices. (Emphasis added, footnote omitted.)

99 Sup. Ct. at 1955. In doing so, this Court recognized the program specific nature of the benefited class under Title IX, as well as the inapplicability of Title IX to the general employment practices of recipients unless employees are the intended beneficiaries. Indeed, in *Cannon* the Court specifically found that the "petitioner [student applicant] is clearly a member of that class for whose *special* benefit the statute was enacted." *Id.* at 1956 (emphasis added).

This construction of the program specific scope of Section 901 is confirmed by the legislative history of Title VI, from which the "program and activity" lan-

guage is derived. During the debates on the 1964 Civil Rights Act, concern was continually expressed that Title VI would permit intervention into every aspect of the operations of recipients. In response to those concerns, Title VI was redrafted to make it program specific, and the floor statements in both Houses confirm this intent.[34] Moreover, in response to a request from Representative Celler, chairman of the House Judiciary Committee, concerning a list of programs and activities involving federal financial assistance within the scope of H.R. 7152 (which was later given greater specificity in section 601 of the Dirksen-Mansfield substitute), Deputy Attorney General Katzenbach stated:

> The impact of title VI is further limited by the fact that it relates only to participation in, receipt of benefits of, or discrimination under, a federally assisted program. As to each assisted program or activity, therefore, title VI *will require an identification of those persons whom Congress regarded as participants and beneficiaries, and in respect of whom the policy declared by Title VI would apply.*

House Judiciary Hearings at 2774.

Witnesses testifying during the Title IX hearings also understood that "program or activity" applied to the direct beneficiaries of programs funded under specific grant statutes.[35] More importantly, however, as previously noted, Senator Bayh's first Title IX proposal contained an institutional rather than program specific approach and would have applied to "any" program or activity of an educational institution receiving federal funds. Had the Senate adopted such an institutional approach, then there might be some justification for HEW's

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[34] *See* 110 Cong. Rec. at 1518-19, 21 (remarks of Rep. Celler; *id.* at 1542 (remarks of Rep. Lindsay); *id.* at 1602 (remarks of Rep. Mathias); *id.* at 2480-81 (remarks of Rep. Ryan); *id.* at 6545 (remarks of Sen. Humphrey); and *id.* at 7060 (remarks of Sen. Pastore).

[35] *See, e.g., House Title IX Hearings* at 645-61 (Testimony of Dr. Peter Muirhead on behalf of HEW).

regulations. In revising his bill to conform to the House version of Title IX, however, Senator Bayh narrowed his proposal so as to adopt the program specific language found in Title VI and the House bill.

In the context of federal education statutes, therefore, it is clear that Title IX does not regulate the employment policies of recipients unless its employees are intended beneficiaries. "Beneficiaries" of Title I of the Elementary and Secondary Education Act of 1964, 20 U.S.C. § 241 a-m, for example—the largest program of federal assistance below the college level—are disadvantaged children.[36] Teachers, guidance counselors, or janitors, on the other hand, are not the intended beneficiaries of such programs but are simply employed to make available the federally financed benefits.[37] Indeed, regulation of general employment practices is inherently nonprogram specific because employment practices cut across programs receiving federal assistance and those which do not.

B. The Pinpoint Termination Provision in Section 902 Confirms the Program Specific Scope of Section 901.

By adopting the identical administrative scheme for terminating federal financial assistance under Title IX as under Title VI, Congress made a conscious decision to limit enforcement of Section 901 to the particular education "program or activity [of] any recipient" with termination of federal funds "limited to the particular political entity, or part thereof," if in fact there was discrimi-

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[36] Title I provides that payments made shall be "only for programs and projects . . . designed to meet the special educational needs of [disadvantaged] children." 20 U.S.C. § 241(c). Virtually every grant statute uses "program" or "activity" to describe the basis of the authorization.

[37] As noted previously (see p. 16 & n.28, *supra*), Congress rejected an amendment of Title IX by Senator McGovern which would have applied it to "employment *in connection with* any program or activity associated under the Act." 117 Cong. Rec. 30411 (emphasis added). *Compare* Attorney General Kennedy's more limited interpretation of Section 601 of Title VI at p. 9, *supra*.

nation to intended beneficiaries of such programs or activities. 20 U.S.C. § 1682. Thus, federal assistance to program "A" cannot be terminated because of a finding of discrimination in program "B". As a corollary, a remedy for the aggrieved is not available unless the complainant participated in a program which received federal assistance and was the intended beneficiary of that assistance.

HEW's employment regulations under Title IX, 45 C.F.R. Part 86, Subpart E, however, turn the statute around. As was well-stated by the trial court in *Seattle University v. HEW*:

> Under HEW's Title IX employment regulations, the threshold question is whether an educational institution is merely a recipient of federal funds. If the institution receives any federal funds—even a single program—then HEW can, in its view, regulate all employment practices in all educational programs operated by the institution. This interpretation is erroneous.

16 FEP Cases at 721, *aff'd*, 621 F.2d 992 (9th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3409 (U.S. 1980) (No. 80-493). Thus, inconsistent with the plain meaning of the words used in Section 902 and its legislative history, HEW's employment regulations broadly cut across all programs of a recipient institution irrespective of whether the particular program was supported by federal funds.

This interpretation of the meaning of the language in Section 902—Title IX's enforcement provision—is supported by the legislative history of the identical provision found in Title VI.[38] During the Congressional hearings on the 1964 Civil Rights Act, the question frequently arose as to whether assistance to one program could be cut off because of a finding of discrimination in another. The Administration's cabinet-level representatives con-

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[38] *See* Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 Geo. L. J. 49, 50-54, 65-67 (1976).

sistent answer was that it could not.[39] A reading of the floor debates on Title VI in both Houses, moreover, reinforces the conclusion that under no circumstances would discrimination in one program justify action with respect to any other program.

During House debate on H.R. 7152, the enforcement authority of Title VI was not completely understood. To clarify the situation, Congressman Mathias brought to his colleagues attention Attorney General Kennedy's assurance during committee hearings that any termination of assistance would be "as specific and particular as it possibly could be" and he highlighted that this certainly was the understanding of the members of the Committee in working on the bill.[40]

When the House bill, H.R. 7152 reached the Senate, the Senate floor leader for Title VI emphasized that "[p]articipation in one program would not justify the exaction of a non-discrimination assurance concerning some other program."[41] Similarly, Senator Ribicoff, one of the two authors of the version of Title VI passed by the House, pointed out that "[u]nder no circumstances" would discrimination in one program justify any action with respect to any other program.[42] These repeated assurances that assistance in one program could not be terminated because of a finding of discrimination in another program were made prior to the inclusion in

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[39] *See Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary*, ser. 4, pt. II, 88th Cong., 1st Sess. (1963) at 1543 (colloquy between Representative Meader and HEW Secretary Celebreeze that the withholding of funds from one program cannot be used as a means of combatting discrimination in another program); *Hearings on H.R. 7152, as amended by Subcomm. No. 5, Before the House Comm. on the Judiciary*, ser. 4, pt. IV, 88th Cong., 1st Sess. (1963) at 2685, 2766. Attorney General Kennedy indicated that the termination of assistance be limited to the particular program and location where the discrimination exists.

[40] 110 Cong. Rec. 2486 (1964) (remarks of Rep. Mathias).

[41] *Id.* at 7059 (remarks of Sen. Pastore).

[42] *Id.* at 7067 (remarks of Sen. Ribicoff).

Title VI of the pinpoint termination provision found in Section 602, 42 U.S.C. § 2000d-1, which limits any termination of federal assistance to the "particular program, or part thereof," in which the discrimination is found.

When the final version of the 1964 Civil Rights Act was proposed in the Senate, in the form of the Dirksen-Mansfield substitute, Title VI contained the program specific provision. As explained in the Senate debates, "[t]he new language will ensure that Federal funds will be cut off for only those political entities or particular programs or parts of programs in which discrimination is practiced."[43] Moreover, Senator Humphrey, floor leader for the Civil Rights Act, stated that the revisions clarified that "any termination shall affect only the particular program, or part thereof," in which discrimination occurs and such termination "will be restricted to the particular subdivision" in which discrimination is found.[44] Finally, House Judiciary Chairman Celler confirmed Senator Humphrey's interpretation when he appeared before the House Rules Committee to describe the Senate amendments to the bill, stating that "aid to a particular program, will not be cut off because one part of the program or institution is being operated in violation of the law."[45]

The legislative history of Title VI makes clear, therefore, what is evident from the statutory language—federal assistance in one program cannot be terminated because of a finding of discrimination in another program. There is, moreover, no remedy available unless the complainant was the intended beneficiary of that assistance. *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d at 674-76 & n. 4.[46] Irrespective of the presence of "Sec-

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[43] *Id.* at 12689 (remarks of Sen. Saltonstall).

[44] *Id.* at 12714-15 (remarks of Sen. Humphrey). See also *id.* at 13377 (remarks of Sen. Ribicoff).

[45] *Hearing on H. Res. 789 Before the House Comm. on Rules*, 88th Cong., 2d Sess. (1964) at 6.

[46] *See also Simpson*, 629 F.2d at 1233 n. 12; and *Trageser*, 590 F.2d at 89.

tion 604" language, these Title VI standards apply to Title IX. Although Senator Bayh's first proposal adopted an institutional rather than pinpoint termination procedure,[47] his second proposal adopted the House bill's Section 902 language.[48] In doing so, Senator Bayh incorporated the pinpoint termination procedure found in Section 602 of Title VI.

Accordingly, in adopting Section 902 as the mirror image of Section 602, Congress made a conscious decision to limit enforcement of Section 901 to the particular educational "program or activity" receiving federal funds. This means, for example, that Title I funds can only be terminated if there is discrimination in a Title I program, and only to that part of the educational institution in which the discrimination occurred. Moreover, federal assistance to a Title I program cannot be terminated because of discrimination in a program funded under the Vocational Education Act, 20 U.S.C. §§ 1241-1391.

But under HEW's employment regulations, only if an educational institution is completely self-supporting—receiving no federal assistance—would it be exempt from HEW's employment regulations. Derivatively, every program of a school district or university program would be covered by Title IX if only one is federally funded. Such a result is not justifiable in view of the program specific scope of Section 901 and the pinpoint termination provisions in Section 902. Thus, HEW's investigation of employment discrimination complaints under Title IX has been inconsistent with the program specific and pinpoint termination provisions of Title IX. In none of the Title IX employment cases has HEW attempted to determine whether there has been discrimination against intended beneficiaries of federal funds or indeed whether the complainant is an intended beneficiary. Moreover, HEW's institutional view of federal assistance has caused them to conduct investigations of employment practices beyond

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[47] *See* 117 Cong. Rec. 30408 (1971) (colloquy between Senators Dominick and Bayh).

[48] See p. 17, *supra*.

the parameters of a particular program. Accordingly, when HEW has found noncompliance in employment practices, it has sought to terminate all federal funds in all programs irrespective of any finding of discrimination of intended beneficiaries and irrespective of that part of the educational institution in which the discrimination occurred.

The policies underlying Title IX, however, call for a more limited application of its authority under Title IX. Before an investigation can be initiated, the program specific scope of Title IX requires that HEW ascertain that the complainant employee is an intended beneficiary. Because Title IX is designed to protect intended beneficiaries, moreover, the purposes of the statute are not furthered by an investigation broader than that within the program in which the discrimination has occurred. In any event, to the extent that the recipient is found to have discriminated against an intended beneficiary but does not take corrective action, termination of funding proceedings are limited to the program in which HEW finds noncompliance. To use procedures other than these violates the program specific scope and pinpoint termination procedures of Title IX.

III. THE DEPARTMENT OF EDUCATION'S RELIANCE ON AN INFECTION DOCTRINE TO JUSTIFY ITS EMPLOYMENT REGULATIONS IS NOT JUSTIFIED BY DECISIONAL AUTHORITY UNDER TITLE VI AND IS INCONSISTENT WITH THE LEGISLATIVE PURPOSES OF TITLE IX.

In the absence of direct statutory authority to regulate the employment practices of recipients under Title IX, HEW also relies on an "infection" doctrine to justify Subpart E, 45 C.F.R. Part 86. The theory, in essence, is that discrimination against nonbeneficiary employees has the effect of causing discrimination in the delivery of the benefits to intended beneficiaries (students).[49] During

[49] Because HEW's regulations create no jurisdictional prerequisite for a nexus to be established, the infection doctrine cannot serve as a justification for them. Indeed, in none of the Title

the Congressional oversight hearings on HEW's proposed Title IX regulations, Secretary of HEW Weinberger attempted to justify the "institutional" or "infection doctrine" approach HEW had taken to enforcement of Title IX by misconstruing *Board of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068 (5th Cir. 1969), as supporting an "infection doctrine" under Title VI.[50] An analysis of *Finch*, however, leads to the opposite conclusion.

In *Finch*, the Fifth Circuit expressly rejected HEW's interpretation that the word "program" in Title VI did not refer to individual grant statutes, but to general categories such as entire school districts. Moreover, the court held that programs could not be condemned by association. The court refused "to assume, contrary to the express mandate of [the statute], that defects in one part of the school system automatically infect the whole." 414 F.2d at 1074. Thus, under the holding in *Finch*, funds under Title VI are not to be denied or terminated in a federally assisted program unless there is an express finding of discrimination in a particular program. *Accord, Gatreaux v. Romney*, 457 F.2d 124, 128 (7th Cir. 1972) (federal assistance to model cities program unrelated to housing cannot be terminated because of discrimination in a low-rent housing program).

At bottom, moreover, there is little to commend the infection doctrine in this case. The mere assertion of such a nexus between employment discrimination and the program beneficiaries as a predicate to investigation, is an insufficient basis for investigation of employment complaints. Under that standard, employment practices would *always* be subject to an investigation contravening

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IX employment cases was such a nexus established either as a prerequisite to conducting an investigation or prior to notice of HEW's intent to terminate funds.

[50] *Hearings on Sex Discrimination Regulations Before the Subcomm. on Post Secondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 484-85 (1975).

the program specific and pinpoint termination provisions of Title IX. Moreover, these isolated employment discrimination complaints relating to maternity leave and contract renewal do not affect the nondiscriminatory delivery of services to students. *See Sabol v. Board of Education of Willingboro*, 25 FEP Cases 548, 552 (D.N.J. 1980) (Facts alleging a solitary act of employment discrimination are insufficient to establish a pattern and practice of discrimination against students). Significantly, no student or other intended beneficiary has been joined in the complaint and HEW's investigations did not establish or seek to establish that the alleged employment discrimination caused discrimination against intended beneficiaries.

Whatever validity the infection theory may have rests upon an effort to protect intended beneficiaries from discrimination based on sex. But as the plain words of these regulations show, HEW does not consider itself under any obligation to establish discrimination against intended beneficiaries before enforcing the employment provisions of Subpart E. Because employees, not intended beneficiaries are the focus of HEW's regulations, those regulations exceed Title IX and are invalid.

CONCLUSION

The decision of the court of appeals should be reversed and this Court's opinion should make clear that Title IX is program specific and does not authorize the Department of Education to regulate recipient's employment practices unless its employees are intended beneficiaries of federal financial assistance.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
EDWARD E. POTTER
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600

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v.

TERREL H. BELL, *et al., Respondents.*

and

THE TRUMBULL BOARD OF EDUCATION, *Petitioner*

v.

UNITED STATES DEPARTMENT OF EDUCATION AND LINDA POTZ, *Respondents.*

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER OF HILLSDALE COLLEGE

GORDON C. COFFMAN
Counsel of Record

JOHN MICHAEL FACCIOLA
LUISA L. LANCETTI
WILKINSON, CRAGUN & BARKER
1735 New York Ave., N.W.
Washington, D.C. 20006
(202) 783-4800

Counsel for Movant, Hillsdale College, Hillsdale, Michigan

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Hillsdale College, a private, nonsectarian, coeducational college located in Hillsdale, Michigan, moves, pursuant to Rule 36 of this Court's Rules, to file the within brief *amicus curiae* in support of the petitioners, the North Haven and Trumbull Boards of Education. This motion is necessary because the respondent Linda Potz refused to consent to the filing of Hillsdale's brief.

As explained in greater detail in the section of the brief entitled "Interest of Amicus Curiae," Hillsdale is presently involved in litigation in which the validity of the sex discrimination or "Title IX" regulations (34

C.F.R. Part 106 (1980)) is the central issue. Since its founding, Hillsdale has attempted to preserve its independence and autonomy from governmental control by refusing to accept any form of federal or state aid. Under the Title IX regulations, however, Hillsdale is deemed a recipient of federal financial assistance, subject to federal regulatory control in its entire operation, merely because it enrolls students who secure federally financed grants and loans. Hillsdale challenged the assertion of this institution-wide authority by refusing to sign the Assurance of Compliance with the Title IX regulations. Hillsdale believed that Congress passed Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et. seq.* ("Title IX") to bar sex discrimination only in activities and programs receiving federal financial assistance and never intended the Department of Education to have the authority it claimed over Hillsdale which maintains no such activities or programs.

Hillsdale's refusal to sign the Assurance of Compliance has led to an order, which, if not reversed by the Sixth Circuit Court of Appeals, will terminate Hillsdale's students' federally financed loans and grants. If, as seems likely to Hillsdale, this Court resolves the issues presented here by examining the precise meaning of the words "program and activity receiving federal financial assistance" in Title IX then it could simultaneously be speaking to a central issue in the Hillsdale case itself. Hillsdale, therefore, is obliged to address that issue.

Hillsdale will not review the legislative history, judicial authority, and other materials which bear on the question of federal regulatory authority over employment under Title IX which will be discussed by the other parties but will focus instead on the narrower question

of the meaning of the words "program and activity" in Title IX, a question which may not be treated at length by the other parties. Furthermore, Hillsdale believes its brief will assist the Court, for Hillsdale will address this issue from the perspective of a college which believes that there is an abiding, national consensus that the American, private educational system should be protected from the overreaching, excessive, federal regulatory control which the Title IX regulations represent.

RESPECTFULLY SUBMITTED,

GORDON C. COFFMAN
Counsel of Record
JOHN MICHAEL FACCIOLA
LUISA L. LANCETTI
WILKINSON, CRAGUN & BARKER
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4800

Counsel for Movant,
Hillsdale College,
Hillsdale, Michigan.

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v.

UNITED STATES DEPARTMENT OF EDUCATION AND LINDA POTZ, *Respondents.*

BRIEF *AMICUS CURIAE* OF HILLSDALE COLLEGE IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICUS CURIAE

This case involves the validity of the employment section of the regulations[1] promulgated by the Department of Health, Education and Welfare[2] to

[1] 34 C.F.R. Part 106 (1980). The employment section is subpart E, 34 C.F.R. §§ 106.51-106.61. All references herein to the Code of Federal Regulations are to the 1980 edition.

[2] The Department of Health, Education and Welfare no longer exists and its functions with respect to Title IX have been transferred to the new Department of Education.

effectuate the purposes of Title IX of the Education Amendments of 1972 ("Title IX"), the statute which prohibits sex discrimination in education programs or activities receiving federal financial assistance.[3] Hillsdale College, *amicus curiae*, is presently litigating the validity of the Title IX regulations in a case pending before the Sixth Circuit Court of Appeals.[4]

Since its founding in 1844, Hillsdale College, a private, nonsectarian, coeducational college,[5] has refused to accept any federal or state financial aid fearing that to do so would inevitably subject the College to governmental prescription of education policies, jeopardizing the College's academic independence and autonomy. The College, however, enrolled and continues to enroll students who receive federal financial assistance in the form of federal grants or federally insured loans.

Until 1976, it did not appear that Hillsdale's long standing independence was in imminent danger. Even after review of the legislation ultimately enacted into law as Title IX, Hillsdale, and many colleges similarly situated, saw no application of the statute to them because they maintained no program or activity receiving federal financial assistance and the statute's scope was

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[3] Section 901 of Title IX provides, in pertinent part,:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. . . ." 20 U.S.C. § 1681(a) (1976)

[4] *Hillsdale College* v. *Department of Education*, No. 80-3207 (6th Cir., petition for review of order filed March 25, 1980).

[5] The College, located in Hillsdale, Michigan presently enrolls about 1,000 students.

limited to such programs and activities. The implementing regulations adopted by the Department of Health, Education and Welfare, however, were not limited in their commands to actual programs and activities receiving federal financial assistance, but applied to entire educational institutions and school systems in all their programs, activities and employment practices. Moreover, the regulations defined the words "federal financial assistance" and "recipient"[6] in such a way as to deem colleges, such as Hillsdale, "recipients" of federal financial assistance, subject to all the regulations' requirements, even though they received no direct federal aid but merely admitted students who used federal grants and loans to help pay for the cost of their education.

In order for Hillsdale's students to continue to receive their federal assistance, HEW demanded that Hillsdale execute an Assurance of Compliance with the Title IX regulations. Hillsdale refused to execute this document because it was certain that the Congress which passed Title IX never intended HEW to have the universal regulatory authority over Hillsdale which HEW claimed.

Hillsdale's refusal led to an administrative compliance proceeding which has now resulted[7] in an

[6] *See* 34 C.F.R. §§ 106.2(h) ("recipient"), 106.2(g)(l)(ii) ("Federal financial assistance").

[7] Initially, an administrative law judge denied HEW's request for an order terminating federal financial assistance to Hillsdale students. Acknowledging the existence of many cases in which the courts had held that part of the Title IX regulations relating to the prohibition of sex discrimination in employment invalid because it exceeds the statutory authorization granted to HEW, the administrative law judge ruled that HEW did not have the power to require the execution of the Assurance of Compliance. The Reviewing Authority, Civil Rights, reversed that decision, however.

order terminating federal financial assistance to Hillsdale's students unless Hillsdale executes the Assurance of Compliance. There is, of course, no allegation that the College has ever discriminated against anyone; Hillsdale's refusal to sign the Assurance was the only basis for the HEW enforcement action.

Hillsdale has petitioned the Sixth Circuit Court of Appeals for review of that order, arguing, *inter alia*, that the Title IX regulations are in excess of the statutory authority granted HEW because they are not limited in their coverage, as they should be, to those educational programs and activities which receive federal financial assistance.

The determination of the issue before this Court, whether the Department of Education, HEW's successor, has the regulatory authority over the employment practices of petitioner school boards it claims, may well require this Court's interpretation of the meaning of the words "education program or activity receiving Federal financial assistance" in Section 901 of Title IX and an analysis of the consequences of that interpretation for the regulatory authority the Department of Education claims. Several courts, such as the Fifth and Sixth Circuit Courts of Appeals,[8] have held that the Department of Education does not have the authority over all employment practices of school boards, colleges, or universities because the statute limits

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[8] *Dougherty County School System* v. *Harris*, 622 F. 2d. 735 (5th Cir.), *pet. for cert., filed sub nom. Dougherty County School System v. Bell*, 49 U.S.L.W. 3589 (Dec. 22, 1980); *Romeo Community Schools* v. *HEW*, 600 F. 2d 581 (6th Cir.) *cert. denied*, 444 U.S. 972 (1979); *Seattle University* v. *HEW*, 16 F.E.P. Cases 719 (W.D. Wash. 1978) [CCH], *aff'd per curiam*, 621 F. 2d. 992 (9th Cir.), *cert. granted*, 49 U.S.L.W. 3409 (Dec. 1, 1980).

the Department's authority to those programs or activities within the school system or university which actually receive federal financial assistance. If this court uses the same analysis, its decision could affect the Hillsdale case in a most significant way since Hillsdale's case is based, in large part, upon the contention that the Title IX regulations are invalid because they are not "program specific", *i.e.*, limited in scope to actual education programs or activities receiving federal financial assistance. Hillsdale's interest in this case is, therefore, obvious and justifies, Hillsdale submits, the acceptance of this brief.

SUMMARY OF ARGUMENT

In this brief Hillsdale will establish that: (1) the regulatory authority of the Department of Education under Title IX is limited to those activities and programs within an education institution or school system which receive federal financial assistance under federal grant statutes; (2) restricting the Department of Education's regulatory authority to the actual Congressional command serves the acknowledged national interest in preserving from excessive regulatory control the diversity which private educational systems provide American education and culture.

ARGUMENT

I. The Regulatory Authority Of The Department Of Education Under Title IX Is Limited To Those Activities And Programs Within An Education Institution Or School System Which Receive Federal Financial Assistance Under Federal Grant Statutes.

Section 901 of Title IX of the Education Amendments of 1972, (20 U.S.C. §1681), contains Title IX's basic prohibition against sex discrimination in federally assisted education programs; it provides that no person shall, on the basis of sex,:

- be excluded from participation in any education program or activity receiving federal financial assistance;
- be denied the benefits of any education program or activity receiving federal financial assistance; or,
- be subjected to discrimination under any education program or activity receiving federal financial assistance.

Section 902 of Title IX (20 U.S.C. §1682) authorizes federal agencies, such as the Department of Education, to effectuate Section 901's prohibitions with respect to each such program and activity by issuing rules, regulations, or orders of general applicability. The ultimate sanction for failure to comply with the regulations promulgated is the termination of federal financial assistance but the termination must be limited in its effect to the particular program, or part thereof, in which noncompliance with the regulations has been found.

That the institution-wide scope of the Title IX regulations exceeds the statutory authorization granted by Congress is self evident. Title IX protects those who participate in federally assisted "education program[s] and activit[ies]" from sex discrimination by the educational institution or school board operating those programs. A program funded under a federal assistance statute such as a college-operated program to train bilingual teachers, funded under the Bilingual Education Act[9] or an elementary school's bilingual education program for Hispanic children funded under the same act, would be federally assisted education programs under Title IX. Section 901 of Title IX therefore bars the college or the school from taking any action which would, on the basis of sex, "exclude any person from participation in," or "deny such student the benefits of," or "subject him or her to discrimination under" those federally funded bilingual education programs. At the same time, however, a gym class at the school or the glee club at the college are not within the purview of Title IX. Although the class and the club are "education programs or activities" they are not programs or activities which receive federal financial assistance and the Department of Education has no regulatory authority over them.

Section 902 but confirms what Section 901 already makes explicit: Congress did not intend the Department of Education to have the institution-wide authority it claims but instead provided that its regulations be limited in scope and effect to the actual programs within

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[9] 20 U.S.C. § 3233 (Supp. II 1978).

an institution or school system which are funded by federal grant statutes. It provides:

> "Each Federal department and agency which is empowered to extend Federal financial assistance *to any education program or activity* . . . is authorized and directed to effectuate the provisions of section 1681 of this title [20 U.S.C. §1681] *with respect to such program or activity* by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . ." 20 U.S.C. §1682 (1976) (emphasis added).

Thus, the focus of the regulations to be issued must be with respect to the program or activity to which they relate, *i.e.*, the program or activity within the institution or school board which actually receives the federal financial assistance.

The language of Title IX is so clear and the intention of Congress so obvious that every court, save the Second Circuit in this case, has held that the Title IX regulations, because they are not program specific but purport to cover an entire educational institution or school system are invalid. *Dougherty County School System* v. *Harris*, 622 F.2d at 737; *Romeo Community Schools* v. *HEW*, 600 F.2d at 584; *Seattle University* v. *HEW*, 16 F.E.P. Cases at 720-21; *Cf. Board of Public Instruction of Taylor County* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969) (construing the words "program and activity" in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d (1976)).

To all of this the Second Circuit, in this case, gave no real answer. To the school board's assertion that the employment section of the Title IX regulations were

invalid because they were not "program specific", an assertion accepted by every other court to whom it had been addressed the Second Circuit could only say:

> "[W]e think the statute [Title IX] merely requires that any termination of funds be limited to the particular program or programs in which noncompliance with §901 is found and does not require HEW to specify prior to termination which particular programs receiving financial assistance are covered by its regulations." *North Haven Board of Education* v. *Hufstedler,* 629 F. 2d. 773, 785 (2nd Cir. 1980).

This statement is incorrect as is the Court's previous statement, that "[n]othing in §902 [20 U.S.C. §1682] requires HEW only to issue regulations directed at specific programs." *Id.* Section 902 certainly does; it requires that HEW issue Title IX regulations *with respect* to the education programs and activities to which it extended federal financial assistance. Furthermore, the same section requires that any termination of that assistance be limited, in effect, to the particular program in which noncompliance with the regulations is found. Although the Second Circuit claimed that the proper scope of the termination power was not before it,[10] in fact, it will be impossible to obey this statutory requirement if the Department of Education is found to have the institution-wide authority it claims. For example, if the teacher in the *Trumbull* case is found to have a legitimate complaint, the Department of Education will, if the Second Circuit's decision is permitted to stand, terminate aid to the school board even though the failure to comply with Title IX regulations will not have occurred in a program or activity receiving federal financial assistance and the

[10] *Id.* at 785-86.

termination will not be limited to any particular, federally financed program in which the noncompliance with the regulations occurred. Testing the scope of the Department of Education's regulatory authority by examining the consequences of the remedy it will impose establishes, in one more way, that the only proper scope of that regulatory authority is as to programs and activities within an educational institution or school system which actually receive federal financial assistance under specific, federal grant statutes.

II. Restricting The Department Of Education's Regulatory Authority Serves The Interest Of Preserving The Diversity Which Private Education Provides To American Education.

There is a broad, governmental consensus that private education systems, particularly at the college level, provide a stimulating diversity and balance to what would otherwise be an exclusively state-run system and that the preservation of that diversity is in the national interest. Congress has specifically so stated[11] and the Executive branch has shared its view. For example, Joseph Califano, when Secretary of HEW, stated of private colleges and universities:

> "They have been guardians of independent thinking and academic freedom, enjoying a bit more insulation from the whims and pressures of politics than their tax-supported sisters.
>
> Perhaps the greatest contribution of these private institutions, beyond training talent for the nation, has been diversity; the rich variety that colleges like this lend to the American educational landscape.

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[11] *See, e.g.*, 117 Cong. Rec. 39249 (remarks by Rep. Erlenborn, Nov. 4, 1971); H.R. No. 92-554, 92d Cong., 1st Sess. (1971), reprinted in [1972] U.S. Code Cong. & Ad. News 2462, 2590.

> What an incredibly rich resource: Hundreds of institutions, each independent; each solving its problems in its own way; each a vital center of innovation and experiment; each with its own special commitment to cultural and moral values.
>
> It is this diversity that gives American higher education and American life so much of their vitality. It is this diversity that your national government is pledged to nourish and safeguard." 123 Cong. Rec. E3798 (Daily ed. June 15, 1977).

Similarly, this Court has acknowledged that freedom of the "entire university community" is entitled to first amendment constitutional protection, and has struck down governmental attempts to prohibit private education[12] and to interfere unnecessarily with the autonomy and independence of private schools.[13] Despite this consensus, governmental regulation of private, university education has grown so pervasive and particular that private university presidents have warned that the diversity represented by their institutions will soon disappear as all universities are increasingly compelled to conform to a pristine, federal model or archetype.[14]

[12] *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

[13] *Farrington* v. *Tokushige*, 273 U.S. 284 (1927); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

[14] *See, e.g.*, the statements of Kingman Brewster, then President of Yale University, and of Dallin Oaks, then President of Brigham Young University, in Hearings on Sex Discrimination Regulations Before the Subcommittee on Post Secondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess. at 231-37 (Oaks) and at 234 (Brewster), and the statement of John R. Hubbard, President of the University of Southern California, quoted in Oaks, *A Private University Looks at Government Regulation*, 4 J. of Coll. and U. Law 4, 8 (1976). *See also*, G. Roche, *The Balancing Act* (1974). The author, Dr. George C. Roche, III, is the President of Hillsdale College.

The Title IX regulations show how justified that concern is. In a manner unprecedented in the federal regulation of university education, the federal government regulates a university's education of a student from the moment the student considers attending that university until his or her graduation.

The regulations specify at which high schools the university may recruit students for admission,[15] the literature it may provide that student concerning itself,[16] and the tests which the university may require the student to take as a condition of admission.[17] If the student passes the test for admission but needs financial assistance, the regulations specify how the university may use *its own funds* to aid the student[18] even though the funds may come from an entirely private source, such as a bequest to the university to endow a scholarship.

Once the student is admitted, the regulations specify the courses the student may take,[19] the manner in which the student is housed, whether on or off campus,[20] the health services provided the student,[21] and his or her participation in extracurricular activities[22] and sports.[23]

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[15] 34 C.F.R. § 106.23 (b).

[16] 34 C.F.R. § 106.9.

[17] 34 C.F.R. § 106.21(2).

[18] 34 C.F.R. § 106.37.

[19] 34 C.F.R. § 106.34.

[20] 34 C.F.R. § 106.32.

[21] 34 C.F.R. § 106.39.

[22] 34 C.F.R. § 106.31(a). One regulation speaks to the composition of the college's Glee Club (§ 106.34 (f)).

[23] 34 C.F.R. § 106.41.

They would control the hours at which the students must return to their dormitories, and the hours during which the male students may visit the females and vice versa[24] if, before the regulations, such hours had been different for men and women. Finally, they control the manner in which the university may treat the consequences of its students' marriages, pregnancies, and abortions.[25]

This regulatory excess reaches its apotheosis in the Hillsdale case. Hillsdale, which *refuses* federal aid to preserve its independence nevertheless is subject to governmental regulation in its entire operation because of its enrollment of students who receive federal aid.

This Court can interdict this patent overreaching of regulatory authority by stating in this case what every court, save one, has found to be so obvious: the regulatory authority of the Department of Education is limited to those programs and activities which receive federal financial assistance under specific, federal grant statutes. It can do so, of course, without jeopardizing, in any way, Title IX's goal of insuring that tax dollars collected from all the citizens are not spent in a way which precludes some citizens from sharing in the benefits of those expenditures solely because of their sex.

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[24] 34 C.F.R. § 106.31 (b) (4).

[25] 34 C.F.R. §§ 106.21(c), 106.40.

CONCLUSION

The decision of the Second Circuit Court of Appeals should be reversed.

Respectfully submitted,

/s/ GORDON C. COFFMAN
Gordon C. Coffman
/s/ JOHN MICHAEL FACCIOLA
John Michael Facciola
WILKINSON, CRAGUN & BARKER
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4800

Attorneys for Hillsdale College, Amicus Curiae

Luisa L. Lancetti
Of Counsel

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No. 80-986

In The

Supreme Court of the United States

OCTOBER TERM, 1981

THE NORTH HAVEN BOARD OF EDUCATION,
Petitioner,
V.
TERREL BELL, *et al.*,
Respondents,
and
THE TRUMBULL BOARD OF EDUCATION,
Petitioner,
V.
UNITED STATES DEPARTMENT OF EDUCATION
AND LINDA POTZ,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE YALE LAW WOMEN'S ASSOCIATION

Barbara D. Underwood
Burke Marshall
Yale Law School
Box 401-A Yale Station
New Haven, CT 06520
(203) 436-8483

QUESTION PRESENTED

Whether the regulations issued by the Department of Education prohibiting sex discrimination in educational employment are valid under Title IX of the Education Amendments of 1972.

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No. 80-986

In The

Supreme Court of the United States

OCTOBER TERM, 1981

THE NORTH HAVEN BOARD OF EDUCATION,
Petitioner,
V.
TERREL BELL, *et al.*,
Respondents,
and
THE TRUMBULL BOARD OF EDUCATION,
Petitioner,
V.
UNITED STATES DEPARTMENT OF EDUCATION AND LINDA POTZ,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTEREST OF THE AMICUS

The Yale Law Women's Association is an organization of women students at Yale Law School.[1] As women, as students, and as aspiring professionals, the members of the Yale Law

[1]All female students at Yale Law School belong to the Yale Law Women's Association. The organization serves three primary purposes: it creates a sense of community among Yale Law women; it gathers and shares information on issues of particular concern to women, and it works to increase educational and professional opportunities for women.

Women's Association (YLWA) have an interest in the outcome of this case. As women, we support and depend upon the effort made by the Department of Education[2] to eradicate sex discrimination in educational institutions receiving federal funds. As students, we seek the opportunity to learn from faculty members of both sexes in a nondiscriminatory, nonsexist environment. As aspiring professionals, we need faculty sponsors who will not hesitate to support us in our efforts to achieve academic and professional excellence. The regulations at issue here help achieve each of these ends.

The YLWA strongly endorses respondents' arguments that educational employees as well as students are among the direct beneficiaries of Title IX. In this brief, however, we wish to emphasize the inseverable link between employment discrimination and discrimination against students. We will demonstrate that female students — a group which all parties to this litigation agree are protected by Title IX — are themselves harmed by the discriminatory employment practices of federally funded educational institutions.

This brief is submitted in support of respondents with the consent of all parties to the case pursuant to Rule 36.2 of the Supreme Court Rules.

STATEMENT OF THE CASE

Title IX of the Education Amendments of 1972 proscribes discrimination on the basis of sex under any educational program or activity receiving federal financial assistance. Section 901(a) of the statute, 20 U.S.C. § 1681 (a), provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the

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[2]At the time this litigation was commenced, jurisdiction over Title IX rested with the Department of Health, Education, and Welfare. On May 4, 1980, jurisdiction over Title IX was transferred to the new Department of Education.

> benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....

Section 902 of the statute, 20 U.S.C. § 1682, authorizes federal agencies that extend financial assistance to any educational program or activity "to effectuate the provisions of section 1681" by issuing "rules, regulations or orders of general applicability." Pursuant to this provision, the Department of Health, Education and Welfare (HEW) issued regulations, codified at 45 C.F.R. Part 86 (1975). Subpart E of these regulations, 45 C.F.R. §§ 86.51 - .61, prohibited federally funded educational institutions from discriminating on the basis of sex in various aspects of the employment process, including recruitment, hiring, compensation, and fringe benefits. In May 1980, these regulations were reissued by the Department of Education and codified at 34 C.F.R. §§ 106.51 - .61.

The two actions consolidated in this case, *North Haven Board of Education* v. *Bell* and *Trumbull Board of Education* v. *Bell,* raise the issue of the validity of Subpart E of the regulations under 20 U.S.C. §§ 1681-1682. The facts of these cases are as follows.

In January, 1978 a tenured teacher in the North Haven school system filed a private complaint with HEW, alleging that the Board of Education had refused to rehire her because she had taken a one-year maternity leave. In response to her complaint, HEW began an investigation of the school system's employment policies. North Haven refused to comply with HEW's request for relevant information, asserting that HEW lacked authority under Title IX to regulate educational employment practices. The North Haven Board of Education then brought an action in federal district court seeking injunctive and declaratory relief.

The second case before the court involves a similar set of circumstances. Respondent Linda Potz, a former guidance counselor in the Trumbull school system, filed a complaint with

HEW alleging that the Board of Education had discriminated against her on the basis of sex. She claimed, *inter alia,* that the school system had given her inferior job assignments, had provided her with inadequate working conditions and had failed to renew her contract. *North Haven Board of Education* v. *Hufstedler,* 629 F.2d. 773, 775 (2d Cir. 1980). HEW undertook an investigation and determined that the Trumbull Board of Education had, in fact, violated Title IX.[3] In September 1978 HEW ordered Trumbull to take corrective action, including the reinstatement of Potz. The Board of Education refused and filed this action, seeking declaratory and injunctive relief against both HEW and Potz.

In both the *North Haven* and *Trumbull* cases, the school boards challenged HEW's authority to issue Subpart E of the regulations. In both cases, the district court granted the boards' motions for summary judgment, holding that HEW had exceeded its regulatory authority in issuing the regulations contained in Subpart E. HEW appealed both decisions. On July 24, 1980 the United States Court of Appeals reversed the judgments, holding that "HEW has authority under Title IX to promulgate the employment discrimination regulations at issue here." *North Haven,* 629 F. 2d at 786.

Certiorari was granted in these consolidated cases on February 5, 1981.

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[3]HEW's findings included a determination that the school district's discriminatory treatment of respondent Potz had a definite impact on students. "The move of complainant's office to the gym had a demeaning effect on the complainant in the eyes of her...counselees." Joint Appendix at 38. From HEW's findings, it also appears that Potz was given a heavier caseload than her male co-workers, and thus her counselees, who were mostly female, were less well served than the male students counseled by her male counterparts. *See id.* at 38. *See also* affidavit of Linda Potz Evanko, *id.* at 52.

SUMMARY OF ARGUMENT

Title IX of the Education Amendments of 1972 prohibits sex discrimination in federally funded educational programs. Sex discrimination in educational employment denies students, on the basis of sex, full benefits of those programs. Thus, the Department of Education was plainly acting within its statutory authority when it promulgated regulations prohibiting sex discrimination in educational employment.

Indeed, the language and the legislative history of Title IX suggests that it confers authority on the Department of Education to protect employees directly. But should any doubts as to Congressional intent on this point arise, an examination of the detrimental effect of discriminatory employment practices on the equal educational opportunities of *students* compels the conclusion that these regulations are well within the scope of Title IX.

Sex discrimination in educational employment denies students, on the basis of sex, full benefits of federally funded educational programs. At all levels of instruction, discrimination against female employees deprives female students of role models and sponsors available to their male counterparts. Social science evidence demonstrates how profoundly this scarcity of female models undercuts the aspirations and achievements of female students. Studies also indicate that a lack of female mentors and sponsors restricts women students' access to academic and professional careers. Sex discrimination in educational employment perpetuates judicially and Congressionally condemned stereotypes regarding the abilities and "proper roles" of women.

Again, social science evidence documents the detrimental effects of such stereotypes on the educational opportunities of young women. Individual instances of discrimination, as well as the cumulative effects of discriminatory practices transmit and reinforce these harmful stereotypes. Precedents from the school desegregation context, moreover, illustrate how strongly a

school's employment policies can affect its learning environment. As this Court's race discrimination cases demonstrate, students learn from what their schools do as well as what they teach. When schools exclude women from important positions, or treat their female employees in a discriminatory and unfair manner, female students suffer.

The transient character of student bodies, coupled with the time consuming nature of judicial or administrative action further renders these regulations necessary to effectuate the provisions of Title IX. Students harmed by discriminatory employment practices may not immediately recognize the seriousness of their injury or may graduate from the offending institution before an action can be brought. The Department of Education regulations provide an essential administrative mechanism for protecting students against the pernicious effects of discriminatory employment practices. The regulations at issue thus serve the undisputed policy objective of Title IX: the provision of equal educational opportunities for male and female students. They are a valid exercise of the Department of Education's regulatory authority under Section 902 of the statute and should therefore be upheld.

ARGUMENT

THE CHALLENGED REGULATIONS ARE VALID BECAUSE SEX DISCRIMINATION IN EDUCATIONAL EMPLOYMENT DENIES STUDENTS, ON THE BASIS OF SEX, FULL BENEFITS OF EDUCATIONAL PROGRAMS.

The plain language and legislative history of Title IX demonstrate Congress' intention to include educational employees among the "persons" protected by the statute. But even if Congress had not directly addressed the problem of employment discrimination, the regulations at issue would be essential to effectuate the basic purposes of Title IX. For sex discrimination in educational employment not only injures the affected employee; it also injures female students. These injuries deprive students of the benefits of a non-discriminatory education, benefits to which they have an unchallenged statutory right. 20 U.S.C. § 1681(a).

A. Sex Discrimination In Educational Employment Harms Female Students By Depriving Them Of Successful Models, Supportive Advisors, and Professional Sponsors

As Congress has recognized, long-standing and pervasive sex discrimination has contributed to a severe under-representation of women at almost all levels of the academic hierarchy.[4] Common sense suggests, and social science has verified, that this

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[4]During the Congressional debates on Title IX, Senator Bayh pointed to the shortage of female professors and to the "virtual nonexisten[ce]" of female administrators as evidence of "the continued second class status of women in education despite a decade devoted to civil rights." 118 CONG. REC. 5805, 5804 (1972). More recent statistics reveal only limited gains. In 1978-1979, women constituted less than 26% of all university level faculty members. Only 9.6% of full professors and 18.9% of associate professors were female. NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 100, 104 (1980). Moreover, as of 1976, only 26% of university level administrators were women. *Id.* at 103 (derived data)

scarcity of female faculty and administrators harms female students at all stages of their educational careers.

1. The Scarcity of Female Academics Denies Female Students the Opportunity to Observe Women Achievers and Discourages Them From Entering Nontraditional Careers

When an educational institution discriminates against female academics, it does more than restrict the employment opportunities of qualified individuals. It also deprives female students of emulable models of female achievement and success. The

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A recent study of sex-based employment discrimination in higher education compares these figures with the dramatic increase in the number of doctoral degrees awarded to women in the past ten years and concludes:

> the inability of women to improve their collective position in the academic labor market is not the result of a dearth of qualified applicants. Rather, this situation is at least in part the result of discriminatory hiring and promotion practices...

Friedman, *Congress, the Courts, and Sex-Based Employment Discrimination in Higher Education: A Tale of Two Titles,* 34 Vand. L. Rev. 37 (1981).

Public school employment statistics reveal similar patterns. While women constitute a majority of all elementary school teachers, their numbers decline sharply at the junior high and high school levels. *See* NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 11 (1980). Moreover, few women occupy high administrative posts in the public school system, and those who do are overwhelmingly concentrated at the elementary school level. As of 1973, women constituted 13.5% of all public school principals, but only 2.9% of all junior high principals and 1.4% of all high school principals. M. STEELE, WOMEN IN VOCATIONAL EDUCATION 101 (Project Baseline Supplemental Report 1974) *reprinted in Sex Discrimination and Sex Stereotyping in Vocational Education: Hearings Before the House Comm. on Educ. and Labor,* 94th Cong., 1st Sess. 253-405 (1975).

importance of such "role models" is well documented in the social science literature.[5] As one study explains:

> Being in daily close touch with working intellectual women...must for many students open and facilitate the development of new conceptions of what is possible in their own lives.

Douvan, *The Role of Models in Women's Professional Development,* 1 Psych. Women Q. 5, 8 (1976).

A shortage of female models undercuts female students' incentives to strive for academic excellence at an early age. The lack of female high school teachers in such traditionally male fields as mathematics and science, for example, has been shown to constrict the career goals of many high school females.[6] As

[5] *See, e.g.,* S. ANGRIST & E. ALMQUIST, CAREERS AND CONTINGENCIES 163-68 (1975) (faculty and occupational role models are particularly important to women making nontraditional career choices); Douvan, *The Role of Models in Women's Professional Development,* 1 Psych. Women Q. 5 (1976) (women students benefit greatly from exposure to female teachers who present diverse models of female professionalism and who clearly enjoy their careers); O'Leary, *Some Attitudinal Barriers to Occupational Striving in Women,* 81 Psych. Bull. 809, 819 (1974) (absence of female models in nontraditional work roles impairs the occupational aspirations and achievements of women).

[6] *See* Stake & Granger, *Same-Sex and Opposite-Sex Teacher Model Influences on Science Career Commitment Among High School Students,* 70 J. Educ. Psych. 180, 186 (1978) (scarcity of female science teachers discourages high school girls from setting science career goals). *See also* Doherty & Culver, *Sex-Role Identification, Ability, and Achievement Among High School Girls,* 49 Soc. Educ. 1 (1976) (high ability high school girls not provided with sufficient inducements and encouragement to promote maximum academic achievement); Heilman, *High School Students' Occupational Interest as a Function of Projected Sex Ratios in Male-Dominated Occupations,* 64 J. Applied Psych. 275 (1979) (perceived gender composition of an occupation influences degree to which high school females consider it a viable career choice).

the materials Senator Bayh put before the Congress in support of Title IX emphasized, the scarcity of female models continues to impair the aspirations of female students at the college level:

> We agree with the observation in the Report of the Women's Action Program that "bias against women professors and administrators in colleges and universities has denied both professional women a just opportunity for work and *students a chance to observe models of female achievement.*"

Letter to Senator Bayh from the National Federation of Business and Professional Women's Clubs, *reprinted in* 118 CONG. REC. 5813 - 14 (1972) (emphasis added).[7] Indeed, studies indicate that the lack of female professors in most academic disciplines is responsible, in part, for the narrow range of occupational choice of a majority of undergraduate women.[8] In addition, the dearth of female models with whom female students can discuss problems, anxieties, and future plans has been identified as an important reason for women's higher dropout rate, especially from graduate programs.[9]

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[7]See also 118 CONG. REC. 5808-09 (1972) (Sex Discrimination in Higher Education Fact Sheet).

[8]*See, e.g.,* Fox, *Some Observations and Data on the Availability of Same-Sex Models as a Factor in Undergraduate Career Choice,* 7 Soc. Focus 15 (1974) (limited number and variety of female professors negatively influences the career aspirations of undergraduate women); Zuckerman & Cole, *Women in American Science,* 13 Minerva 82, 85 (1975) ("As a consequence of the small numbers of women in science, many undergraduates never encounter a woman scientist at all. Although Madame Curie may serve as an inspiring model for some young women, for others she is all too remote and formidable a figure to emulate.").

[9]*See, e.g.,* Holmstrom & Holmstrom, *The Plight of the Woman Doctoral Student,* 11 Am. Educ. Research J. 1, 6-7 (1974); Sells, *Sex Differences in Graduate School Survival,* Paper Presented at the American Sociological Association Annual Meeting, New York, N.Y. (August 28, 1973).

Elizabeth Tidball's studies of "female achievers" further document the critical role that female faculty play in female student success. Based upon investigations of the educational backgrounds of 1,500 women randomly selected from three editions of *Who's Who of American Women,* Professor Tidball found a positive relationship between the number of women on a college's faculty and that college's output of "women career achievers." She concludes:

> the substantial importance of women faculty...can be inferred with considerable confidence. This is not to say that an abundance of adult women role models is the only predictor of subsequent achievement of women students; but it does reinforce the relative importance of this relationship in comparison with other institutional variables.

Tidball, *Women's Colleges and Women Achievers Revisited,* 5 SIGNS: J. Women in Culture & Soc'y 508 (1980).

Tidball's research also underscores the close relationship between an institution's treatment of female personnel and the encouragement it offers to female students:

> the nutritive environment for women undergraduates is closely related to the environment that prevails for women faculty and administrators...one cannot expect a high return on the investment in women students if institutions are uncommitted or hostile to women academic professionals.

Tidball, *Perspective on Academic Women and Affirmative Action,* 54 Educ. Rec. 130, 132-33 (1973).

The dearth of female models engendered by discriminatory employment practices creates a self-perpetuating cycle for women students: because women are discouraged from entering nontraditional academic careers, they fail to become models for

later generations of female students.[10] Moreover, the lack of female professors and administrators fosters skepticism on the part of male educators about women's potential for academic excellence. Such skepticism, in turn, reinforces outdated stereotypes and often leads to further discrimination against female students and job applicants.[11]

2. The Scarcity of Female Administrators Results in Educational Policies Which Neglect the Interests and Aspirations of Female Students

In addition to depriving women students of models of female success, the scarcity of women in faculty and administrative positions often results in the underemphasis or total neglect of educational issues of particular concern to women. Without women in teaching and policy-making positions, the problems of sex stereotyping in textbooks, sex discrimination in job counseling, and sex-based standards for scholarship are unlikely to be solved.[12] Moreover, the scarcity of women in faculty and

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[10]Stake & Granger, *supra* note 6, at 186. *See also* Kashket, Robbins, Leive & Huang, *Status of Women Microbiologists,* 183 Science 488, 494 (1974).

[11]*See, e.g.,* J. GAPPA & B. UEHLING, WOMEN IN ACADEME: STEPS TO GREATER EQUALITY 33-34, 59 (1980) (small number of female academics reinforces men's views of women's allegedly limited potential for successful academic careers; negative gender-based stereotypes become institutionalized in recruitment, admissions, and financial aid practices); Bunting, Graham & Wasserman, *Academic Freedom and Incentive for Women,* 51 Educ. Rec. 386, 386 (1970) (shortage of female professors may condition men's perceptions of women's potentialities; outdated views held by many male professors threaten the intellectual aspirations of women students).

[12]*See* Mayes, *Women in Positions of Authority: A Case Study of Changing Sex Roles,* 4 SIGNS: J. Women in Culture & Soc'y 556, 558, 567-68 (1979) ("The more women in the institution had any authority, the more new attitudes toward women's roles were discussed.... Insofar as social attitudes are related to behavior, women in

administrative posts means women are less likely to be represented on committees dealing with such student-oriented issues as admissions, educational policy, and institutional research, and are less available to serve as advisors to student organizations.

3. The Scarcity of Female Academics on Graduate and Professional Faculties Deprives Female Students of Essential Mentors and Sponsors

Teachers at every educational level do more than simply prepare and present lectures. They also serve as mentors, advisors and sponsors. These functions are especially important at the graduate and professional school level, where the protege system is a prime means of career advancement.[13] In denying fair and equal treatment to female academics and administrators, educational institutions thus restrict women students' access to the collegial networks that are so important for professional training and success.

When a university excludes women from its tenured faculty positions, its female students must seek academic "sponsorship" from male professors who may never have worked with women as colleagues. Such professors all too frequently hold stereotypic views of women's motivations and abilities, and

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positions of male authority can be said to promote some sex-role change for both males and females.") *See also* Tidball, *Of Men and Research,* 47 J. Higher Educ. 373, 376-79 (1976) (data suggest that while most male faculty "are relatively sensitive to issues that affect their women students and arouse their women colleagues," men teaching at institutions with a high percentage of women faculty tend to be the most affirming with respect to these sex-related issues).

[13] *See, e.g.*, S. FELDMAN, ESCAPE FROM THE DOLL'S HOUSE 91-93, 119-23 (1974); Epstein, *Encountering the Male Establishment: Sex Status Limits on Women's Careers in the Professions,* 75 Am. J. Soc. 965 (1970); Holahan, *Stress Experienced by Woman Doctoral Students, Need for Support, and Occupational Sex Typing: An Interactional View,* 5 Sex Roles 425, 426 (1979).

exhibit insensitivity to issues affecting women students. *See* Tidball, *Of Men and Research,* 48 J. Higher Educ. 373 (1976).[14] Members of predominantly male faculties are often reluctant to sponsor female graduate students because of unfounded doubts about women students' commitment to their professions.[15]

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[14]*See also* CARNEGIE COMMISSION ON HIGHER EDUCATION, OPPORTUNITIES FOR WOMEN IN HIGHER EDUCATION 96-97 (1973).

Striking evidence of such harmful stereotypic attitudes is found in Lunneborg & Lillie, *Sexism in Graduate Admissions: The Letter of Recommendation,* 28 Am. Psychologist 187 (1973). This study examined the application files of 123 students admitted to graduate study at the University of Washington over a five year period and found sexist comments (defined as statement implying a lower level of expectation for women than men, or commenting on physical traits irrelevant to graduate study) in 11 of the 38 female files surveyed. Examples included:

> "Pretty she's not, but pleasant and sparkly and energetic she is"; "In personality she shows poise, vivacity, good humor and charm. She makes an excellent social impression, being attractive, well-groomed, and appropriately dressed. I believe she has a fine reputation and I would have no reason to question her character, morals, or emotional health. She is the kind of women who should be encouraged to pursue graduate study"; "She is a quiet yet personable young woman, rather neat and attractive though not likely to unduly distract male graduate students"; "She is task-oriented, self-starting, non-neurotic. An unusual girl graduate student."

Id., at 188.

[15]*See, e.g., Sandler, The Status of Women: Employment and Admissions, reprinted in* 118 CONG. REC. at 5809-12 ("Supposedly, women marry, retire from academic life and waste their years of expensive training. Supposedly, they just aren't as committed to work the way men are. The facts do not support this myth."); Holmstrom & Holmstrom, *supra* note 9 at 2 (31% of the women doctoral students responding to a Carnegie Commission survey reported that professors in their departments did not take women graduate students seriously); Schwartz & Lever, *Women in the Male World of Higher Education,* in ACADEMIC WOMEN ON THE MOVE 57, 70-71 (S. Rossi & A. Calderwood eds. 1973).

Such male professors may also hesitate to accept female proteges because they are unable to view women as their "successors,"[16] or because they believe that they will not derive status from having female "disciples."[17] Finally, male professors who have never worked with women as academic equals may simply view all women — their female graduate students included — as intellectually inferior.[18]

The sponsorship barriers faced by female graduate students directly impair their productivity and academic success. Recent studies indicate that female Ph.D. candidates with male thesis advisors are not as productive as female candidates with female advisors. *See* Goldstein, *Effect of Same-Sex and Cross-Sex Role Models in the Subsequent Academic Productivity of Scholars,* 34 Am. Psychologist 407 (1979). Similarly, a 1974 survey of male and female microbiologists indicated that from the beginning of their professional training, most female microbiologists felt handicapped by a lack of faculty encouragement and support. Female respondents in the survey consistently reported that they received little advice regarding their professional futures and rarely felt pushed to undertake the most challenging academic endeavors. Kashket, Robbins, Leive & Huang, *Status of Women Microbiologists,* 183 Science 488, 492-93 (1974). Studies of female medical students reveal similar patterns.[19]

[16] *See* White, *Psychological and Social Barriers to Women in Science,* 170 Science 413, 414 (1970) ("Unfortunately a man may be hesitant about encouraging a woman as a protege. He may be delighted to have her as an assistant, but he may not see her as his successor or as one who will carry on his ideas, or as a colleague.") *See also* Epstein, *supra* note 13, at 969.

[17] *See* Schwartz & Lever, *supra* note 15, at 70; White, *supra* note 13, at 414.

[18] Schwartz & Lever, *supra* note 15, at 71.

[19] *See* Bourne & Wikler, *Commitment and the Cultural Mandate: Women in Medicine,* 25 Social Problems 430 (1978) (male professors' expectations and proscriptions that women will give priority to marriage and family over medicine have restricted the options of female medical students and led to the definition of certain types of medical work as inappropriate for women).

Lack of academic and professional sponsorship has contributed as well to the disproportionately low percentage of female editors on most scholarly journals. *See* Teghtsoonian, *Distribution by Sex of Authors and Editors of Psychological Journals,* 1970-1972, 29 Am. Psychologist 262, 268 (1974).

A shortage of female mentors and sponsors may also restrict the job opportunities of female graduate students. Under traditional recruiting methods, an academic department's junior faculty positions are often filled by soliciting the recommendations of colleagues at other graduate institutions.[20] In a pervasively male system, both the faculty members contacted and the students recommended are likely to be men.[21]

The barriers faced by female graduate and professional students are thus particularly strong in academic fields dominated by men. *See* S. Feldman, *Escape From the Dolls' House,* 119-23 (1974) (describing difficulties faced by women students in establishing collegial or apprenticeship relationships in five scientific fields). Even in fields in which women have made significant inroads — such as law — however, the problems remain:

> the survey suggests that while giving lip service to equal opportunity the typical law professor harbors doubts with respect to women law students which extend from concern for lack of equal opportunities in the profession to beliefs that women are either not needed or are unsuited for certain areas of the law. Such ambiguous feelings on the part of professors are certainly to be translated into equal ambivalence in their relationship to women law students, resulting in continued "special" treatment for them.

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[20] J. GAPPA & B. UEHLING, *supra* note 11, at 49.

[21] *Id. See also* CARNEGIE COMMISSION ON HIGHER EDUCATION, *supra* note 14, at 119-20.

Jason, Moody & Schuerger, *The Woman Law Student: The View From the Front of the Classroom,* 24 Clev. St. L. Rev. 223, 241 (1975).

Sex discrimination in educational employment thus denies female students of all ages the role models and sponsors they need for academic success and professional advancement. Faculties from which women have been excluded are least likely to develop programs and policies that affirm female students' abilities and aspirations. Discrimination against female academics and administrators directly interferes with women students' attempts to build necessary professional relationships. Clearly, "old boy" systems created by discriminatory employment practices do not accord young women the equal educational opportunities guaranteed them by Title IX. The regulations at issue here prohibit discriminatory practices that impair the educational achievement of women students. They should therefore be upheld.

B. Sex Discrimination in Educational Employment Harms Female Students by Tainting Their Learning Environment with Inaccurate and Derogatory Stereotypes

As recognized by this Court in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), a school imparts much more than its academic curriculum. Educational institutions play a critical role in shaping and transmitting societal values and in helping students "to adjust normally to [their] environment." *Id.,* at 493. When a school discriminates against female employees, its female students are taught that gender is more important than individual merit in determining success and that women are not suited for positions of authority and power. Both individual instances of discrimination and the cumulative effects of discriminatory practices transmit and reinforce these harmful stereotypes.

1. Individual Instances of Discrimination Reinforce Legally Proscribed Stereotypes

As this Court recognized in *Frontiero* v. *Richardson,* 411 U.S. 677, 684 (1973), our nation's "long and unfortunate his-

tory of discrimination" has been predicated on unflattering stereotypes about women. Over the past ten years, the Court has emphasized both the unfairness and the pernicious effect of such stereotypes. In evaluating legal distinctions based on sex, this Court has repeatedly struck down schemes which are based on "archaic and overbroad" generalizations, *Schlesinger* v. *Ballard,* 419 U.S. 498, 508 (1975), or which reflect old notions "that are more consistent with 'the role typing society has long imposed'...than with contemporary reality. *Califano* v. *Goldfarb,* 430 U.S. 199, 207 (1977), quoting *Stanton* v. *Stanton,* 421 U.S. 7, 15 (1975).

Congress has also recognized the harm caused by outdated and inaccurate gender-based stereotypes. In enacting Title IX, Congress considered the role such unfair stereotypes play in justifying and perpetuating discrimination against women in the educational setting:

> We are all familiar with the stereotype of women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children and never work again. The desire of many schools not to waste a "man's place" on a woman stems from such stereotyped notions.

118 CONG. REC. 5804 (1972) (remarks of Senator Bayh).

The facts of the cases before the Court demonstrate how individual instances of sex discrimination in an educational setting can communicate and reinforce derogatory stereotypes. When a female guidance counselor such as respondent Potz has her office moved "to a smaller, poorly heated, and less comfortable space in the gymnasium away from the other counselors" and is required "to perform typing and to run errands not required of male counselors," *North Haven,* 629 F. 2d at 775, her female counselors learn that women who attain professional positions do not have to be treated equally with their male colleagues. When the North Haven Board of Education refuses to rehire a

tenured female teacher who has taken a one year maternity leave, female students are shown the incompatability of childbearing and career goals. They thus find it difficult to believe that the female is no longer "destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Stanton* v. *Stanton*, 421 U.S. 7, 14-15 (1975).[22]

Such individual instances of discrimination send a "silent but potent message" to female students that only men are fit to occupy the most challenging and responsible positions, and that for women to aim for the top would be foolish indeed.[23] The detrimental effects of such "messages" on the self-images of young women is well documented in the social science literature.[24] By proscribing discrimination against individual female

[22]Thus, petitioners' suggestion that discriminatory maternity leave policies could have no effect on students is clearly incorrect. *See* Petitioners' Brief at 107.

[23]*Sex Discrimination and Sex Stereotyping in Vocational Education: Hearings Before the House Comm. on Educ. & Labor*, 94th Cong., 1st Sess. 109 (1975) (statement of Professor Pamela Roby).

[24]*See, e.g.*, Gordon & Hall, *Self Image and Stereotypes of Femininity: Their Relationship to Women's Role Conflicts and Coping*, 59 J. Applied Psych. 241 (1975) (women's perceptions of male stereotypes about women found to be the strongest predictor of female role conflict; role conflict decreased the more potent, supportive and unemotional the woman perceived the male's image of femininity to be); Hacker, *Women As A Minority Group*, 30 Soc. Forces 60, 68 (1951) ("Part of the explanation [for women's secondary economic and social status] may lie in women's having internalized cultural notions of femininity in certain fields, and even the most self-confident or most defensive woman may be filled with self-doubt as to whether she can do productive work."); O'Leary, *supra* note 5 at 814 (prevalence of gender-based stereotypes substantially affects women's self-perceptions and behavioral responses); Schein, *The Relationship Between Sex Role Stereotypes and Requisite Management Characteristics*, 57 J. Applied Psych. 95 (1973) (sex-role stereotypes may deter women from striving to succeed in managerial positions).

employees, the regulations at issue help to eradicate these inaccurate and damaging stereotypes that limit the aspirations and achievements of female students.

2. The Cumulative Effects of Discriminatory Employment Practices Taint the Learning Environment for Female Students

Students need not witness individual cases of unfair treatment to be harmed by sex discrimination in educational employment. The observation of patterns created by discriminatory practices and policies is sufficient. As one court noted:

> Allegedly discriminatory practices which intend or result in limited access of women to, and small numbers of women in, supervisory school positions may well retard society's effort — as reflected in congressional legislation and Supreme Court cases construing the equal protection clause — to eradicate outdated and stereotypic notions about the proper role of women.... If, in fact, women are not appropriately represented in the higher levels of the school hierarchy, students — male and female — may well be presented with the notion that while women may teach, they are not suited, or qualified, to occupy positions of added authority and broader responsibility. Such an impression may well carry over to a view of the appropriate role of women in society as a whole.

Caulfield v. *Board of Education of the City of New York,* 486 F. Supp. 862, 885 (E.D.N.Y. 1979) (Weinstein, J.), *aff'd,* 632 F. 2d 999 (2d Cir. 1980), *cert. denied* 101 S.Ct. 1739 (1981).

This Court has acknowledged, in the school desegregation context, how profoundly the patterns generated by discriminatory employment policies can affect a school's academic environment. In *Bradley* v. *School Board of Richmond,* 382 U.S. 103 (1965) (per curiam), this Court held that the impact of racially based faculty allocations upon the educational opportu-

nities available to black students could not be deemed "speculative," but must be carefully scrutinized in evaluating the acceptability of a school desegregation plan under the principles of *Brown.* Similarly, in *Rogers* v. *Paul,* 382 U.S. 198 (1965), the Court held that black students "plainly had standing" to challenge an alleged policy of assigning faculty on the basis of race because "racial allocation of faculty denies [students] equality of educational opportunity without regard to segregation of pupils." *Id.,* at 200.

Bradley and *Rogers* established that discrimination against school *employees* could violate *students'* constitutional rights under the Fourteenth Amendment.[25] The lower federal courts have recognized that racially discriminatory employment practices can violate Title VI of the 1964 Civil Rights Act as well. Given the oft-noted similarities between Title VI and Title IX, *see Cannon* v. *University of Chicago,* 441 U.S. 677, 694-709 (1979), these cases are particularly pertinent to the dispute at hand. Thus, in *United States* v. *Jefferson County Board of Education,* 372 F. 2d 836 (5th Cir. 1966), *cert. denied* 389 U.S. 840 (1967), the Fifth Circuit rejected arguments that the exclusion

[25]The idea that discrimination directed against one group of persons can harm another, related, group is certainly not new to the jurisprudence of civil rights. As early as 1971, the Fifth Circuit, in *Rogers* v. *E.E.O.C.,* 454 F. 2d 234 (5th Cir. 1971) held that an employer's discriminatory treatment of Hispanic *clients* could create a discriminatory and offensive work environment for Hispanic *employees,* and would thus support a charge of employment discrimination under Title VII. Similarly, in *Gray* v. *Greyhound Lines, East,* 545 F. 2d 169 (D.C. Cir. 1976;, the District of Columbia Circuit explicitly recognized the psychological harm to present black employees flowing from an employer's racially discriminatory hiring practices, and held that such psychological harm could provide the basis for a Title VII claim. More recently, in a case involving sexual harassment, the District of Columbia Circuit held that Title VII was violated where "an employer created or condoned a substantially discriminatory work *environment,* regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination." *Bundy* v. *Jackson,* 641 F. 2d 934, 943-44 (1981) (emphasis in original).

of employment practices under Section 604 of Title VI barred any action requiring the desegregation of faculty and school personnel.[26] Drawing upon the Supreme Court decisions in *Bradley* and *Rogers,* the court in *Jefferson County* held that nondiscriminatory allocation of faculty was "indispensible to the validity of a desegregation plan," and that racial discrimination in the employment and assignment of teachers violated students' educational rights under Title VI "wholly aside from its effect upon individual teachers." *Id.* at 885, 883.

Subsequent cases establish that the nexus between discriminatory employment practices and the educational rights of students is not limited to the segregation context. In *United States* v. *El Camino Community College District,* 600 F. 2d 1258 (9th Cir. 1979), the Ninth Circuit upheld HEW's authority under Title VI to investigate the employment practices of a community college on the grounds that the agency "must have substantial latitude in scrutinizing policies and practices of the institution that may have a discriminatory impact on the intended beneficiaries of assistance." *Id.* at 1260 (footnote omitted). While acknowledging that HEW's requirements might be burdensome, the court in *El Camino* emphasized that a greater good justified the inconvenience, namely, an education "entirely free from any discriminatory taint." *Id.* at 1261 (footnote omitted).

The results of sex-based employment discrimination also "taint" an institution's educational environment. They suggest to students that women as a class are less capable and less deserving than men. Recently, in *Caulfield* v. *Board of Education of the City of New York,* 632 F.2d 999 (2d Cir. 1980) *cert. denied,* 101 S.Ct. 1739 (1981), the Second Circuit made explicit

[26]The argument for upholding DOE's authority to prohibit discrimination in educational employment is thus even stronger under Title IX than under Title VI. Section 604 of Title VI explicitly excludes most employment practices from the statute's coverage, yet courts have nevertheless recognized the effect of employment discrimination on the rights of students. Title IX contains no such statutory exclusion.

the connection between disciminatory employment practices and harm to female students. Rejecting the school board's argument that HEW lacked jurisdiction under Title IX to investigate the school system's employment practices, the Second Circuit noted:

> the government could reasonably proceed on the theory that a school system's discrimination against women in access to supervisory positions would have a discriminatory effect on students, the direct beneficiaries of the federal aid.

Id. at 1005, citations omitted.

C. *The Distinctive Character of Student Bodies Renders These Regulations Necessary to Effectuate the Provisions of Title IX*

The relative brevity of various stages of the educational process, coupled with the time-consuming nature of judicial or administrative action, renders these regulations necessary "to effectuate the provisions" of Title IX. In many cases, the students whose educational experieces are tainted by the effects of employment discrimination will graduate or transfer from the offending institution before legal relief can be obtained. By establishing departmental jurisdiction over discriminatory employment practices, the regulations provide for the correction of harmful conditions that would otherwise evade review.

The often subtle and cumulative nature of these injuries increases the need for departmental jurisdiction. Individual students, particularly at the elementary and secondary school levels, may not immediately recognize the corrosive effects of employment discrimination on their educational environment. By affording a mechanism whereby this discrimination can be remedied, the regulations ensure that no such student will be denied the benefits of any educational program receiving federal financial aid.

CONCLUSION

Sex discrimination in educational employment directly affects the hearts and minds of female students. When educational institutions are permitted to act in ways which denigrate the abilities and ignore the rights of women, female students suffer. To allow such practices undermines the very policy of nondiscriminatory education mandated by Title IX. For the foregoing reasons, this Court should uphold the regulations at issue and affirm the judgment of the Second Circuit Court of Appeals.[27]

Respectfully submitted,

YALE LAW WOMEN'S ASSOCIATION

By its attorneys,

Barbara D. Underwood
Burke Marshall
Yale Law School
Box 401-A Yale Station
New Haven, CT 06520
(203) 436-8483

By /s/Barbara D. Underwood
Barbara D. Underwood
Attorney of Record

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[27]The following members of the Yale Law Women's Association made substantial contributions to the research and writing of this brief: Jane Ellis, Candice Hoke, Susan Knipps, Jana Singer, Anne Verdon, and Rhonda Wasserman.